Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCK,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. When does the life of a child begin?

2. Do children possess the natural and inalienable right to live or possess constitutional rights acquired through the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States at any time from conception to birth?

3. Whether it is violative of the natural and inalienable rights of a child or the child's natural father, or the rights of either of them acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States for New Jersey to fail to recognize Mr. Loce's standing to raise the rights of his child?

4. Where a child asserts his or her right to live, does the child's rights, when balanced against a mother's Fourteenth Amendment liberty interest, require the state to protect the child's interest in life at any time from conception to birth under any particular circumstance?

5. Is it an unconstitutional infringement of a child's natural and inalienable rights or the child's Fourteenth Amendment Due Process or Equal Protection rights or the rights of the child's father for New Jersey to convict Mr. Loce of trespass when his conduct was only that necessary to protect the life of his child?

6. Does a father have a Due Process and Equal Protection Right to defend the life of his child?

7. Whether this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992), *Roe v. Wade*, 410 U.S. 113 (1973), or other precedent prohibits

the Courts of New Jersey from applying New Jersey Constitutional protections, which extend rights to children prior to birth, to prohibit the criminal or quasi-criminal prosecution of Mr. Loce under the facts of this case?

8. Does New Jersey have an interest in protecting a mother's right to terminate the life of her child before birth sufficient to support a conviction of a father for attempting to defend and protect his child's life and interest in life?

9. Whether, in light of the undisputed facts of human development, and the recently acquired scientific evidence of the humanity of the child prior to birth, the actions of the State of New Jersey, through its legislative enactments, executive actions and the acts of its courts, which result in the painful dismemberment and death of children prior to birth (even after "viability"), are violative of the natural and inalienable rights of those children and their rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Petitioner is Alexander Loce, the father of a child whose life he sought to protect. Mr. Loce first instituted a civil suit in the Superior Court of New Jersey on September 7, 1990, seeking to enjoin the abortion of his child. When he exhausted his civil suit that night (New Jersey Supreme Court Justice Robert Clifford denied single justice relief), Mr. Loce attempted to protect the child's life the next day, September 8, 1990, by blocking access to the operating room at the clinic where the child's mother sought to terminate the child's life.

Respondent is the State of New Jersey which refused to provide Mr. Loce and his child access to court by dismissing his civil complaint and then removed him from the premises of the clinic so the child's life could be terminated, and arrested, prosecuted and convicted him of trespass for acting in the child's best interest and attempting to defend the child's life.

There are no other parties on this petition. There were fourteen co-defendants in the state court proceedings, and four of them, Tina Krail, Lori Chadwick, Deborah Smoldore, and Jeannie Henderson, have filed a separate Petition with this Court on behalf of the four of them only. That Petition is cited herein as "Krail Pet." The other ten co-defendants have not filed a Petition.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1993

No. 93-

Alexander Loce,

Petitioner

v.

The State of New Jersey

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner Loce respectfully prays that a Writ of *Certiorari* issue to review the June 30, 1993 judgment of the Appellate Division of the Superior Court of New Jersey and that of the New Jersey Supreme Court entered on October 21, 1993.

ORDERS AND OPINIONS DELIVERED IN THE CASE

The April 29, 1991 order of the municipal court of Morristown, New Jersey convicting petitioner under N.J.S.A. 2C:18-3 (trespass) is at A-201. The opinion of the Superior Court of New Jersey, Law Division, entered October 8, 1991, affirming the conviction is at A-89-106 [630 A.2d 843 (1991)]. The opinion of the Appellate Division, dated June 30, 1993, affirming the conviction solely on federal grounds, citing *Roe v. Wade*, 410 U.S.

113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992) is at A-82-88; [630 A.2d 792 (1993)]. The Order of the New Jersey Supreme Court entered October 21, 1993 denying Certification is at A-204.

STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review a Final Order of the Supreme Court of New Jersey entered October 21, 1993 and the opinion and order of the Appellate Division of the Superior Court of New Jersey, dated June 30, 1993. The Petitioner has claimed rights under the constitution of the United States, all the issues presented were raised below and the jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following constitutional provisions:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law." U.S.Const., amend. XIV, §1;

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

The petitioner was prosecuted and convicted for attempting to save the life of his child, while those who terminated the child's life enjoyed governmental protection. This is an abortion case.

A. STATEMENT OF FACTS

Alexander Loce was engaged to be married when his fiancee, Ms. Z, learned she was pregnant with their child. When Ms. Z told petitioner she planned to terminate their child's life he tried to persuade her against an abortion [A-90]. On September 7, 1990, Mr. Loce sought to restrain the abortion. That day the Superior Court dismissed his complaint, the Appellate Division affirmed the dismissal and the New Jersey Supreme Court denied single justice relief [A-90; 202-203].

With the intent to prevent the death of his child, Mr. Loce went to the abortion clinic the next day, with fourteen others, entered the building, sat on the floor and locked himself to the others with handcuffs and bicycle locks blocking the entrance to the operating rooms [A-91]. He was removed from the premises, arrested and charged with trespass under N.J.S.A. 2C:18-3(b). The child's life was terminated later that day at the same clinic.

B. PROCEDURAL HISTORY

Petitioner was tried in Morristown April 13, 1991 before Hon-

orable Michael J. Noonan. Mr. Loce stipulated to all of the elements of the offense under 2C:18-3(b) except the requisite criminal intent, and subject to the affirmative defenses under N.J.S.A. 2C:3-5 (forceful protection of other persons), N.J.S.A. 2C:32-2 (use of force for necessity and other justifications), N.J.S.A. 2C:3-10 (justification in property crimes), N.J.S.A. 2C:3-8 (force by persons with special responsibilities) and New Jersey State Constitution Article I, Section I (right to defend life), and that his conviction would constitute an unconstitutional deprivation of his and his child's natural and inalienable rights to life and defend life and the rights of both of them arising under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution [A-92-93; A-86-87; A-188-189]. New Jersey stipulated at trial that Ms. Z was the fiance of Mr. Loce and eight weeks pregnant with their child. Mr. Loce introduced eloquent evidence establishing the fact that human life begins at conception, that the child is a complete, separate, unique human being immediately following conception, the child can experience pain as early as eight weeks after conception [A-109-169], and his only purpose was to defend his child's life [A-86, A-91].

On April 29, 1991 Judge Noonan found that the life of a person

begins at conception, that the eight week old "fetus" was a person, a human being, and was a "separate and distinct human being from the mother, was a living person, ... unique and individual" [A-198]. Nonetheless, he convicted Mr. Loce under N.J.S.A. 2C:18-3(b) because he felt bound by *Roe v. Wade*, supra, which, he stated "legalized the execution of a human being" [A-200]. Petitioner appealed to the Superior Court, Law Division which affirmed the conviction by the same reasoning [A-108] [630 A.2d 843]. Petitioner appealed to the Appellate Division, arguing that his conviction is a violation of the federal and state constitutional rights of Mr. Loce and his child. On June 30, 1993 the Appellate Division affirmed the conviction [630 A.2d 792] and the Supreme Court of New Jersey denied a petition for certification by order entered October 21, 1993 [A-204].

The Appellate Division clearly affirmed solely on federal law:

> Although stated in a variety of ways, defendant Loce contends that (1) human life begins at conception and the unborn child enjoys the constitutional protection of due process under the Fourteenth Amendment to the United States Constitution and Article I of the New Jersey Constitution, (2) the genetic father has standing to raise the constitutional rights of the fetus and has an independent constitutional right to protect the unborn child, (3) their rights are paramount to the privacy interest of the mother, and (4) the criminal prosecution constituted an improper intrusion upon the fundamental rights of Loce and the unborn child. ... The right to an abortion ... established by the

> United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, ... has only recently been reaffirmed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _ 112 S.Ct. 2791 (1992). The purported rights asserted by defendants independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighed, are firmly established. [A-86-88]

This Court has never decided when the life of a child begins, and whether a child has rights prior to birth (in light of the child's existence). The child's personal interest in life has never been examined and weighed and the true nature of a mother's interests have never been identified in the context of the child's actual existence. Certiorari should be granted to decide these issues.

REASONS WHY CERTIORARI SHOULD BE GRANTED

In this case one parent acted in the best interest of his child while New Jersey assisted, and protected the other parent's termination of their child's life. The New Jersey Courts ruled they were precluded by *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S._, 112 S.Ct. 2791 (1992) from recognizing that the child was a human being possessing rights before birth. The resulting injustice is the product of *Roe's* failure to decide when the life of a human being begins, and whether, recognizing that a child is a human being prior to birth, these children have constitutional rights. In *Casey*, both the

Joint Opinion and the Dissent stated it was necessary *Roe* be reexamined.[1] However, by not reexamining whether the child possesses constitutional rights prior to birth, *Casey* failed to reexamine *Roe* in its most essential element.[2] Until now this court has only balanced a very limited set of perceived interests of a woman against a poorly defined interest of the states, without consideration of the child's personal interest in actual life. As a result, the interests of a mother and the "interests of the State" have not been satisfactorily identified and their relative weight when balanced have never accurately reflected the real interests of either.[3] The problem stems from the Court's conclusion that it

[1] Casey, 112 S.Ct. at 2804; Rehnquist, C.J., dissenting 112 S.Ct. at 2855.

[2] See, similar observation of Justice Scalia, dissenting, 112 S.Ct. at 2875. Justice Stevens alone addresses the question in Casey. But his statement that the Joint opinion implies that the child is not a "constitutional person" is no more true than the observation that the Joint Opinion implies that a child, after viability, is unequivocally a person in fact. The latter contradicts the former. *Casey* addressed neither. See, *Casey*, 112 S.Ct. at 2807.

[3] This is substantially acknowledged in *Casey*, 112 S.Ct. at 2818. The mother's right was defined in *Roe* as "fundamental" throughout pregnancy. The state's interest in protecting the life of the child was not recognized before "viability" and thereafter the state's interest (described as one to protect "potential life") became "compelling." *Roe*, 410 U.S. at 163, 164. In *Casey*, a mother's rights are neither referred to as "fundamental" nor the state's interest as "compelling" but the result is the same: a mother and her physician may terminate the life of her child before "viability" but the state can prohibit it thereafter. In both analyses it is never precisely defined what is occurring: does the interest of the mother diminish [or is it now waived]? See, *Casey*, 112 S.Ct. at 2817] or does the state's interest become greater (as stated in *Roe*?) The waxing and waning of either set of interests has often been the subject of criticism. See, *Thornburgh*

could not, in 1973, reach reliable judgment about the fact of the child's existence (and therefore ignored the child's interest in actual life). By failing to address the fact of the child's life, the court has rendered a *de facto* judgment which imposes upon all of society the view that the lives of this class of children have no value — precisely the judgment about the lives of people that governments, especially courts, have no power to make. [See, IIB]. Equally important is the fact that the child's existence materially alters the true nature of the interests of a woman. Her interests as a pregnant mother must be taken into account, and they conflict with any "interests" before pregnancy which are inconsistent with those of her child. Ignoring this reality has resulted in harm to the mothers subjected to abortion as a "remedy" to satisfy unprotectible "interests" in conflict with her real ones. [See, Pt. III].

v. A.C.O.G., 476 U.S. 747, 814, 828 (O'Connor, J., dissenting) "I do, however, remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-466. The state has compelling interests in ensuring the general health and protecting potential human life, and these interests exist 'throughout pregnancy')" Id. at 461. *Thornburgh v. A.C.O.G.*, 476 U.S. at 785 (White, J., dissenting) "the state's interest, if compelling after viability, is equally compelling before viability.") *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) ("We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability and ... therefore be a rigid law allowing state regulation after viability but prohibiting before viability.")

I. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA WHICH DEMONSTRATE THAT: (1) THE LIFE OF A PERSON BEGINS AT CONCEPTION; AND (2) THE CHILD EXPERIENCES PAIN PRIOR TO BIRTH. THESE FACTS REQUIRE A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER A CHILD HAS RIGHTS PRIOR TO BIRTH.

A. THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

1. The Inability of the *Roe* Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.

The whole basis for the *Roe* decision was the premise that in 1973 it was not possible to determine when life began:

> (1) We need not resolve the difficult question of when life begins. ...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer" 410 U.S. at 159 (emphasis added); and [therefore] (2)...The word 'person', as used in the Fourteenth Amendment, does not include the unborn. 410 U.S. at 158.

Roe is the only case in which the United States Supreme Court reviewed that issue.[4] Significant recent developments and discoveries in science and medicine require a re-examination of Sections IX(A) and IX(B) of *Roe*, 410 U.S. at 156-162, which reserved that question for a later Court when "man's knowledge"

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[4] *Casey* reexamined *Roe* but did not review Sections IX(A) and IX(B) of *Roe*.

is sufficient.[5] Because *Roe* did not determine when the life of a child began, its legal analysis was quite irrelevant to the one the Court must provide once it is found that the child is a human being prior to birth.[6] Thus, *Roe*: [1] ignored what would otherwise have been applicable principles of constitutional interpretation as they apply to the rights of the child [see, IIA2]; and [2] misidentified a mother's true interests to the detriment of the woman of this nation [see, Point III]. *Roe* also ignored prior precedent of the Court which found a corporation was a "person" with liberty rights under the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Grosjean* is relevant in three separate ways: [1] a corporation no more meets the *Roe* test for a "person" than does

[5] If *Roe* had benefit of current knowledge it would have found life begins at conception. See IB below; A-109 to A-169; Appendix B at A-19 to A-30.

[6] *Roe* found that it was "persuaded" that "person" "as used in the Fourteenth Amendment" did not include the "unborn." 410 U.S., 158. To reach this conclusion *Roe* relied upon a review of clauses in which the word "person" appeared. This approach is irrelevant when it is recognized that life begins at conception (or any time before birth). For one thing, it ignores the Equal Protection Clause and recognized Due Process concepts which incorporates equal protection. See, *Regan v. Taxation with Representation*, 461 U.S. 540 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Washington v. Davis*, 426 U.S. 229 (1976). If "person" as used in the Equal Protection Clause (and therefore the due process clause) could contain classes of "persons" so that it would apply to some but not to others, it would constitute an inherent contradiction rendering the Equal Protection Clause meaningless. Any construction of "person" in the Due Process Clause can only be conducted simultaneously with *Roe's* inquiry under Section IX(B), when the life of a human being begins (see, IIA2).

a child prior to birth;[7] [2] *Grosjean* has precedential value on the issue of *stare decisis* to overrule *Roe*;[8] [3] *Grosjean* found that a corporation, although not a person under the citizenship clause included in the amendment because it was not "born" or "naturalized", was a "person" with rights under the Due Process Clause.[9]

2. The Question of the Child's Rights is the Sort of Mixed Question of Fact and Law Which Requires Overruling Prior Precedent When New Facts, or New Appreciation of Old Ones, show that that Precedent Erroneously Applied Constitutional Principles.

Stare decisis is not a bar to the reexamination of *Roe* when new facts, or new appreciation of old ones, require it.[10] Of particular

[7] The difference was that the Court in *Grosjean* had to acknowledge the existence of a corporation, where the *Roe* Court said it could not determine the existence of the child. "Existence" becomes the most pertinent question. No theory of individual rights could justify inclusion of the legal fiction of a corporation as a "person" and deny the same right to any class of human beings.

[8] *Grosjean* construed the same word ("person") in the same Due Process Clause and overruled prior cases which excluded corporations as "persons" who enjoyed liberty interests. *See, Northwestern Life Insurance Co. v. Riggs*, 203 U.S. 243, 355 (1907); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363; (1907) *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). it is precedent which expanded the class of "persons" to whom the Due Process Clause applies.

[9] Obviously, construction of "person" in one clause is not necessarily relevant to another. Birth, therefore, is not a requirement of persons under the due process clause. *Roe* therefore creates a tragic contradiction: corporations, created by government, cannot be denied due process; individual human beings, owing nothing to government for their existence and for whose protection government was created, are denied the unalienable right to live. Once the child's humanity is determined, Roe's analysis is irrelvant [see pt. II below].

[10] Although this case is of first impression, there are at least 174 instances in which this court has overruled, in whole or in part, its previous constitutional decisions. See: Brandeis, dissenting in *Burnet v. Coronado Oil and Gas Co.*, 285

relevance is the dissent of Justice Brandeis[11] in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413:

> The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from...interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause ...; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute; .. In every such case the decision,...is dependent upon the determination of...a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

Whether a child before birth is a person to whom the Fourteenth Amendment applies is a mixed question of fact and law, precisely this type of determination. In reaffirming that portion of *Roe* which found that the Due Process Clause "is broad enough to encompass

U.S. 393, 406-409 n1 (1932); *Annette E. Wilson, "Stare Decisis" Quo Vadis?*, 33 Geo. L.J. 251, 254 n. 17 (1945); William O. Douglas, "stare decisis," 49 Colum. L.Rev. 735-743, 756-758(1949); Albert R. Blaustein and Andrew H. Field, Overruling Opinions in the Supreme Court, 57 Mich. L.Rev. 151, 184-194(1958); The Constitution of the United States of America: Analysis and Interpretation, 1317-18, Lester S. Jayson, et al. ed. (1973). *Payne v. Tennessee* (Marshal, J., dissenting) 111 S.Ct. 2597, 2610, 2611 n.1 (1991). See App. A at A-1 to A-18.

[11] The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.*, 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

a woman's decision whether or not to terminate her pregnancy," *Casey* expressly declined to state that *Roe* was correctly decided either on constitutional principles[12] or moral grounds,[13] and articulated a reluctance to do so [at 2812]. The Court, unable to affirm either *Roe's* correctness or its morality, affirmed *Roe* based upon *stare decisis* and perceptions of a divisive national debate. Whether the principles outlined in *Casey* operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in this case.[14]

B. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES PROVIDE NEW FACTUAL INFORMATION WHICH DEMONSTRATES THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE CHILD EXPERIENCES

[12] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability... The matter is not before us in the first instance, and coming as it does after nearly twenty years...we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that [it] must be accorded." 112 S.Ct. at 2817. Only two Justices were willing to unequivocably state *Roe* was correctly decided.

[13] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." *Casey*, 112 S.Ct. at 2806.

[14] This court has never decided the questions here presented. But even if *Roe* can be considered to have decided the question, two critical distinctions made by Justice Brandeis apply here. First, the problem is not one of interpretation (clearly the Due Process Clause textually affirms the right to life of all persons), but rather one of applying a recognized right to specific circumstance. Secondly, the legal question is a mixed question of fact and law.

PAIN DURING ABORTIONS IN THE EARLY STAGES OF DEVELOPMENT. THERE IS A CONSENSUS WITHIN SCIENCE AND MEDICINE CONCERNING THE BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION.

1. The Exploding Revolution of Molecular Biology Has Changed Man's Knowledge of Developmental Neurology.

Biologically, human beings are made up of molecular building blocks. Their development is controlled by the genetic material DNA and RNA which contain instructions carried out by the synthesis and functioning of proteins. In 1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations and biochemical studies on often heroic quantities of material. Since *Roe*, there have been many scientific, medical and technological advances and discoveries.[15] They show ignorance, errors of fact and judgment

[15] Including: (1) Recombinant DNA Technology (allows the production of a large amount of specific pieces of DNA which assists in DNA probe research); (2) DNA Probe Technology (use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence); (3) Southern Blot (combines the separation of molecules by electric charge and size with DNA probe technology); (4) Northern Blot (combines the separation of molecules by electric charge and size along with RNA probe technology for DNA); (5) DNA Mapping (process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes)); often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived); (6) DNA Finger Printing (a procedure whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot pattern; provides a test for relatedness between samples of DNA; used with PCR such comparisons can be done on as little as one cell from each source; (7) Polymerase Chain Reaction (PCR) (a test tube method of amplifying DNA sequences to billions of times invented in late 1984 used to obtain information from a single cell); (8)

concerning past scientific understanding of the child's existence as a unique human being, early development, ability to react to its environment and to feel pain prior to birth. These techniques permit scientists to observe human existence and development at

Monoclonal Anti-Body Technology (antibody preparation which contains only single type of antibody molecule); (9) Hybridona Technique (used to produce human specific antibodies; detects human proteins or peptides); (10) Flow Cytometry (cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of light; produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property - used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood); (11) Improved Ultrasound Technology (permits observation of the fetus at early ages of gestation); (12) DNA Methylation (modification of DNA so that it is recognized as different); (13) Fetal Heart Monitoring (observes the operation of the human heart of the fetus at early stages of development); (14) Advances in electroence photography which improve detection of signals of brain activity; (15) DNA cloning (application of DNA techniques to prenatal diagnosis of certain single gene disorders introduced in 1976; DNA-based tests first applied for prenatal diagnosis of alpha Thalassemia, 1978, sickle cell anemia, 1978, beta-thalassemia, 1980, hemophilia A, 1985, hemophilia B, 1984, phenylketonuria, 1985, Duchenne and Becker muscular dystrophy, 1985, cystic fibrosis, 1986, and Huntington's disease, 1986. Boehm, C.D., et als., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991)); and (16) the use of restriction endonuclease enzymes. Martinis, J.; et als., "Novel Applications of Monoclonal Antibodes." In *Basic Biology of New Development* In *Biotechnology In Basic Life Sciences* 25(1983): 129-154, at p. 129-130. Cole, S.C.P., et als., "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109; Watson, J.D., et als., *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983. Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985; Arnheim, N., et als., "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J., et als., "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N., et als., "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174; Holding, C., et als., "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H., et als., "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

a molecular level, applicable in determining genetic uniqueness, genetic diseases, sex and paternity through the analysis of human genes well in advance of gross anatomical observation.

2. The Life of Each Person Begins at Conception.

(a) Recent Developments in Science Support the Conclusion that the Life of a Human Being begins at Conception.

All of the genetic information and material necessary for the complete development of a unique human being is present at the moment of conception, when the male sperm penetrates inside the female's ovum. The child is a complete human being for life from conception and the essence of the human being is complete.[16]

Methylation of cytosine supports this conclusion. It's significance was unknown five years ago: DNA is even more sophisticated than previously suspected and its messages are written letter by letter, piece by piece. Everything to allow

[16] See LeJeune, A-108 to 140. See authorities cited in Appendix B at A-19 following petition; see also, Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584; Harlock E.B. Child Development 6th ed. McGraw Hill, Inc. 1978 p. 53-54; Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975 p. 183; Clark J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985, p. 99. Volpe, E.P. Biology and Human Concerns, 3rd ed. Wm. C. Brown Co. 1983, p. 20.

development of a particular human being exists at fertilization but is not read at the instant of conception. The female information acting in concert with the male information, provides the mechanism for the development of each part of the physical anatomy.[17] This information and sophisticated directed mechanisms is contained in the first cell.[18] At each stage of development cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, etc. It has been determined for instance, that the male way of "spelling" is obligatory for muscles, so that, even in the female, information from which muscles are built needs to be underlined in the male way. This understanding contradicts previous notions about fetal

[17] LeJeune at A-135 to A 138. Chaillet, J.R., et als. "Parental Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77 83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[18] It is absolutely required that in the first cell, there be both the DNA underlined by methylation in the male way and DNA methylation in the female way. This is the only cell in all of the life of a person in which those two methylation systems are present inside a cell unaltered. LeJeune at A 136-137.

development. The child is programmed for life from conception.[19]

Eight years ago Alec Jeffreys developed a technique which can determine the identity of a particular human being by using a region of a person's DNA to make a genetic "fingerprint," which uniquely identifies an individual and can be "read".[20] The Jeffreys technique has been applied to determine if two samples containing genetic material (DNA) are from the same person.[21] The techniques of fetal cell intrusion, prenatal diagnosis of disease, villus sampling, in vitro fertilization, and sexing of preimplanted embryos

[19] LeJeune at A-130 to A-137. Chaillet, J.R., et als. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als., "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[20] LeJeune at A-126 to A-130; Jeffreys, et al *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Jour. of Hum. Gen., 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications,(1991).

[21] Jeffreys, A.J., et als., "Positive Identification of an Immigration Test Case Using Human DNA Fingerprints." *Nature* 317 (1985):818 819, at pp. 818 819. Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356. The technique has been successful in establishing paternity of the developing child at 9 weeks gestation, with a certainty of 360 trillion to one. Kovacs, B.W., et als., "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474 478, at pp. 474 475. The procedure established the existence of a unique human being at the time of the tests.

also establish the existence of a unique human being early in gestation.[22] Modern molecular biology has found that by the third cell division after fertilization control of growth and development has been established by the child's DNA.[23]

(b) There is a Consensus within the Scientific and Medical Communities Concerning the Biological Facts which Support the Conclusion that Life begins at Conception.

In 1981 the Sub-committee on Separation of Powers of the Judiciary Committee of the U.S. Senate (Human Life Bill, S. 158, 97th Cong., 1st Sess.) published a report which specifically found, as a matter of scientific fact, that human life begins at conception:

> The testimony of these witnesses and the voluminous submissions received by the subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: life of

[22] Price, J.O., et als. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731; Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E., et als., *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51; Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53; Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991); Handyside, A.H., et als. 1989 "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348; Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985."

[23] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Mammalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

a human being begins at conception...today the facts are beyond dispute.Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings. *Report on Human Life Bill*, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

Some witnesses argued that the committee should not reach a conclusion about when the life of a person begins because "there was no consensus". The Sub-committee observed:

It may at first seem difficult to reconcile how the existence of such a broad consensus with the testimony of some witnesses opposing S-158 ... who emphatically denied that it is possible to determine when a human life begins. If the facts are so clear, it is crucial to understand how, for example, one...could say that he knows of no scientific evidence that shows when actual human life exists. ...Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in existence of the two distinct questions..., the scientific question and the value question. We must consider not only whether unborn children are human beings, but also whether to accord their lives intrinsic worth and value equal to those of other human beings. ...It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn child has intrinsic worth and equal value with other human beings. ...Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are 'human beings', (meaning) living beings of the human species. Rpt., Human Life Bill, *supra*, at 10, 11.

The report found that some witnesses erroneously claimed that whether the child is a person is a matter of definition, not a question of fact, and "person" can be defined any way one wishes. Only by disregarding the facts could one state that he "knows of no scientific evidence showing when actual human life exists," Report, *supra* at 11, 12.[24]

3. The Child Can Experience Pain as Early as Eight Weeks After Conception.

Dr. Bernard Nathanson testified that a child experiences pain during abortion. A vivid description which he claims supports this conclusion is found in a film made in 1984 of an actual abortion. The baby is seen moving away from the suction apparatus and then the arms and legs of the child are torn off. The mouth of the baby is open, the child is grimacing and evidencing pain. (A-167 to A-169). Recent discoveries now provide scientific evidence of this contention. With monoclonal antibody technology[25] and electro-

[24] The petitioner is unable to find a single modern reference in the scientific literature which refutes the statement that humans are genetically distinct and complete from their parents at the moment of conception. Petitioner compiled a partial list of quotations from scientific and medical journals which state that life begins at conception. A-19 to A-30; A-175-185.

[25] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Elsevier (Amsterdam), 1985

physiology scientists now investigate nervous system function and development at the molecular level. We now know that the classical histological and functional criteria for defining cell types was oversimplified.[26] First described in 1985[27] was the detection of some 30 neuropeptides involved in the functioning human nervous system. Of particular relevance are substance P (chemical messenger of pain) and enkephalin (neurotransmitter involved in pain perception).[28] Their detection in samples of human tissue has been used to define and locate nervous system development and function, the complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. Since *Roe* a number of generally accepted assumptions about human neurological development and ability to feel pain have been

[26] Fischbach, G.D. "An Intro. to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology In Neurology and Psychiatry*, ed. M.D. Erich, et al. New York: Raven Press, 1987.

[27] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[28] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154. Neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue.

refuted: [1] neonates were incapable of feeling pain;[29] [2] myelinated nerve fibers were necessary for pain perception (and did not form completely until after birth); [3] pain experience required pain detecting nerves connected to the thalamus and a mature brain cortex. These assumptions were based upon gross histological observations, with no knowledge of neuropeptides, or the methodologies and techniques recently developed. Only in the last decade has the concept that even normal neonates cannot feel pain been refuted[30] and that a fully developed cortical brain region was necessary for pain perception determined inconsistent with the observations of care givers for premature infants.[31]

[29] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology*, 16(2) p. 549 et seq. (1989).

[30] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[31] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347. Biochemical studies supported the observations of care givers concerning pain experiences. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity. These are associated with experiences of pain. Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417. It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to preterm neonates Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431), and to the fetus Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B.

Based upon new studies standard medical practice changed:

> Any decision to withhold anesthetic agents ought not to be based on the infant's age or *perceived degree of cortical maturity*; it should be based upon the same criteria used in older patients."[32] (Emphasis added).

With operative procedures being performed on premature babies as early as four months, it is a standard medical practice to anesthetize the child (at any age).[33] Anesthesia is used during fetal surgery as early as 18 weeks gestation.[34]

Until recently pain perception was presumed to require myeli-

Saunders Co. p. 176, at p. 176).

[32] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): at p. 1348.

[33] Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989. For discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

[34] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 27-30; Harrison, M.R., et als., "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49; Strickland, R.A., et als., "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 411-415. Harrison, M.R., et als., "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Longuker, M.T., et als., "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R., et als., "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411; Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176;

nated nerve fibers[35]. This is not the case even in adults.[36] Unmyelinated nerve fibers transmit pain.[37] Most fibers of the nervous system are not myelinated until two years after birth.[38] The old view of the nervous system as hard wired, projecting from nociceptors to the thalamus and then to the cortex cannot explain pain experiences.[39] Science now questions that cortical involvement is necessary for pain detection.[40] Evidence supporting the conclusion that pain can be experienced before 23 weeks gestation includes the early detection of pain associated chemicals, the timing of nerve development, the observation of

[35] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at p. 153.

[36] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

[37] Anand, K.J.S.; and Hickey, P.R. Id; Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar, 1985, p. 109; Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, 320.

[38] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

[39] Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy*. Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19.

[40] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects. *Dev. Pharmocol Ther* 15(1990): 142-148, at p. 144. Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and Infant. *Lakartidningen* 88(1991) 1880-1885.

fetal behavior and the characterization of full term infants with anencephaly. The presence of substance P is a leading indicator of an organ system's ability to detect and transmit pain.[41] The involvement of neuropeptides in pain transmission was not known when science originally theorized a sensory cortex was needed for pain perception. It is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration,[42] and was found in neuronal elements of the human cortex at eighteen weeks gestation (earliest time tested).[43] Substance "P" positive neurons and nerve fibers have been detected at eleven weeks and enkephalin positive neurons and nerve fibers at thirteen weeks gestation.[44] Substance "P" has been found as early as five weeks

[41] "The importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed." Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

[42] Manolidis, L.; Baloyannis, S.; and Mandolidis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989: 375-382, at p. 375.

[43] Manolidis, L., Id.

[44] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

gestation and all stages thereafter.[45] The morphological substrate (the necessary pieces) for pain detection in the spinal cord exists at very early developmental stages.[46] At twelve weeks gestation the thalamus, third ventricle, midbrain, brain stem, and cerebellar hemispheres are developed and their appearance, besides physical size, will go unchanged throughout the rest of fetal development.[47] At seven weeks cutaneous sensory receptors appear, preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord:[48]

> neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adult-

[45] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S., et als., "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C., et als., "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.; Uddman, R., et als., "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399; Luo, C.B., et als., "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

[46] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

[47] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., ed. Harrison et al., 92-130, Phila.: W.B. Saunders Co., 1991, at 122.

[48] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322.

> hood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks.[49]

Movement by the fetus away from outside stimulation,[50] and brain activity,[51] have been observed by the eighth week. Nature prepares the nervous system first so that all other systems can develop and function properly.[52] A basic sensory response loop is clearly present about eight weeks gestation.

Many behaviors characteristic of newborns are clearly present in children with anencephaly[53] (children born without a developed cortex).[54] Previously, these behaviors had erroneously been

[49] Lagercrantz, H., et als. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen* 88(1991): 1880-1885.

[50] Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351.

[51] Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

[52] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life*. St. Louis: The C.V. Mosby Company, 1974, at p. 35.

[53] The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[54] Shewmon, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

ascribed to cerebral hemispheric activity.[55] After birth these children breath spontaneously, have a grasp response,[56] and respond to noxious stimuli known to cause pain by avoidance, by withdrawal and by crying.[57] They breath, cough, hiccup, smile, grimace, yawn and suck. In a recent study of twelve anencephalic infants, all twelve responded to pain, had an exaggerated sustained response to touch, evidenced spontaneous movement, and breathed spontaneously.[58] Seven of the twelve responded to a stimulation at their mouth towards the stimulus and a sucking response.[59] Spontaneous movement in the child begins between six and seven and one-half weeks gestation.[60] Stimulation of the

[55] The Medical Task Force on Anencephaly, supra.

[56] Ashwal, S., et als., "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[57] Stumpf, D.A., Med Task Force on Anencephaly."The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S., et als., "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[58] Ashwal, supra.

[59] *Id.*

[60] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking 11 weeks.[61] The child 6 to 11 weeks gestation is neurologically developed at least equivalent to the twelve anencephalic children described above. They are capable of experiencing pain.

II. THE WRIT SHOULD BE GRANTED TO DETERMINE ISSUES NEVER DECIDED BY THIS COURT: [1] DO ALL HUMAN BEINGS ENJOY A RIGHT TO LIVE PRIOR TO BIRTH; AND [2] IS A CHILD'S INTEREST IN LIFE, PRIOR TO BIRTH, CONSISTENT WITH THOSE OF THE CHILD'S MOTHER.

A. THE WEIGHT OF THE LEGAL AUTHORITIES CONCLUDE THAT THE LIFE OF A CHILD BEGINS AT CONCEPTION.

The weight of legal authority supports the conclusion that the child is a human being prior to birth. New Jersey recognizes that a child's life begins at conception. See, *Smith v. Brennan*, 157 A.2d 497, 504-505 (1960); *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (1992); *Gleitman v. Cosgrove*, 227 A.2d 689 (1967). Thirty-six other jurisdictions have found that the life of a child begins at conception.[62] Most of the states which addressed the

[61] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[62] See authorities and quotations from each state which show they find actual life at the earliest pont examined. Appendix C at A-31 to A-57. No state, has made a specific contrary holding. In 1978 the Organization of American States made effective its Declaration of Human Rights, which states: "Every person has the right to have his life respected. This right shall be protected by law, and, in

question have found that "viability" has no relevance of a factual or legal nature.[63] It is as unjust to subject a child to a painful death before "viability" as it is after.

general, from the moment of conception. No one should be arbitrarily deprived of his life." Chapter II, Art. 4, §1. Signed by: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecquador, El Salvador, Grevado, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. 18th Century British Common Law recognized rights in the child from the earliest moments that science could then verify the child's existence. See Appendix D at A-58 to A-71.

[63] *Smith v. Brennan*, 157 A.2d 497 (NJ) (1960), stated:

> The most important consideration, however, is that the viability distinction has no relevance to the injustice...Whether viable or not at the time of inquiry, the child sustains the same harm...157 A.2d at 504.

This point was made in *Kelly v. Gregory*, 125 N.Y.S. 2d 696, 697 (1953):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal. Id. at 697.

See, *Wolfe v. Isbell*, 280 So.2d 758, 761 (1973) (Ala.); *Simon v. Mullin*, 380 A.2d 1353 (1977) (Conn.); *Greater S.E. Comm. Hosp. v. Williams*, 484 A.2d 394, 396 (D.C. Ct. App. 1984); *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976) (Fla.); *Renslow v. Mennonite Hosp.*, 367 N.E. 2d 1250, 1252-53 (1977) (Ill.); *Cheaney v. State*, 285 N.E.2d 265, 268 (1972) (Ind.); *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind.App. 1989); *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951); *Smith v. State*, 33 Me. 48, 57 (1851); *Group Health Ass'n v. Blumenthal*, 453 A.2d 1198, 1206 (1983) (Md.); *Torigan v. Watertown News Co., Inc.*, 225 N.E.2d 926, 927 (1967) (Mass.); *Womack v. Buchhorn*, 187 N.W.2d 218 (1971) (Mich.); *Steggall v. Morris*, 358 S.W. 2d 577, 579-81 (1953) (Mo.); *N.D. Cen. Code*, secs. 12.1-17.02 through 12.1-17.1.06 (Supp. 1991); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D.); *Williams v. Marion Rapid Transit*, 87 N.E.2d 334, 340 (1949) (Ohio); *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970); *Evans v. Olson*, 550 P.2d 924, 925 (1976) (Okla.); *Amadio v. Levin*, 501 A.2d 1085, 1087 (1985) (Pa.); *Sinkler v. Kneale*, 164 A.2d 93, 96 (1960) (Pa.); Sylvia v. Gobeille, 220 A.2d, 222, 223-24 (1966) (R.I.); *Kalafut v. Gruver*, 389 S.E.2d 681, 683-84 (1990) (Va.); and *Puhl v. Milwaukee Auto Ins. Co*, 99 N.W.2d 163, 170 (1959) (Wis.).

B. THE RIGHT OF A PERSON TO LIVE DEPENDS ONLY UPON THE EXISTENCE OF THE INDIVIDUAL HUMAN BEING.

The child has a right to life because (1) government has no power to deny the natural and inalienable right to life from any human being and (2) the class of persons protected by the Fourteenth Amendment is coextensive with all humanity.

(1)

The natural and inalienable right to life is not derived from government but from the fact of the individual's existence, and the interest that each possesses in life.[64] The essence of the right itself prohibits denial by classification or deprivation of its inherent value. The Declaration of Independence states that man's 'unalienable' right to life is a 'self-evident truth', and the purpose of our government is to protect the natural rights of people. This understanding was shared by both the founding fathers and the framers of the Fourteenth Amendment[65], the embodiment of this

[64] See, Constitution of the United States of America: Analysis and Interpretation, Killian, J. et al., ed. (1987), at p. 1623, prepared by the Congressional Research Services, Library of Congress, by joint resolution of congress which observes: "One's right of life existed independently of any formal guarantee of it."..at 1623; see Arkes, H. *Beyond the Constitution*, Prin. Univ. Press, (1990).

[65] Representative Thaddeus Stevens, on the date the Thirteenth Amendment was declared ratified, proclaimed:

"...equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.*

Cong. Globe, 39th Cong., 1st Sess. 74(1865) (emphasis added).

For Abraham Lincoln's understanding of the Declaration and its significance to life

inspiration. Representative John A. Bingham, author of section one of the Fourteenth Amendment stated:

> [T]he Constitution ...declared that "no person shall be deprived of life, liberty, or property without due process of law." By the great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty ... Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal. Cong. Globe, 40th Cong., 1st Sess.542 (1867)(emphasis added).

Alexander Hamilton wrote:

> The principal aim of society is to protect individuals, in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved without that mutual assistance, and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these *absolute rights* of individuals."... *The Papers of Alexander Hamilton*, Vol. I:1768-1778 Ed. Harold C. Syrett, Columbia Univ. Press, N.Y. (1961) "The Farmer Refuted".

James Wilson made it plain that the natural right to life extends to all, beginning as it does, from the moments of life within a mother's womb, and government is powerless to deny it:[66]

and liberty, see his first inaugural address on the relationship of the Constitution and the Declaration. See also partial list of his statements, Appendix E at A-71.

[66] But for Wilson the constitution would probably not have been adopted. McMaster & Stone's History of Pennsylvania in the Convention, p. 758. James Dewitt Andrews, observed that Curtis in his Constitutional History of the U.S. p. 309 claimed that Wilson's speech in November 1787 "is one of the most compre-

> Life, and whatever is necessary for the safety of life, are the natural rights of man. ...With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, *life begins when the infant is first able to stir in the womb*. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, ...These rights and duties are indeed, ... great pillars on which chiefly rest the criminal and the civil codes ... It would surely be preposterous to undermine their foundation, with a view to give strength or stability to what they support - to unfix what rests on the immovable basis of nature, and to place it on the tottering institutions of man. I here close my examination into those natural rights which, ..., it is the business of civil government to protect, and not to subvert, and the exercise of which it is the duty of civil government to enlarge, and not to restrain. *The Works of James Wilson*, Ed. by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II p. 314-335.

Wilson acknowledged the natural right of a father to protect his child's life and the role of government to secure the rights:

> The defense of one's self, justly called the primary law of nature, ...is not confined merely to his own person; it extends to the persons of all those, to whom he bears a peculiar relation, of his wife, of his parent, of his child ... Id., 335.

> Government, ..., should be formed to secure ... the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind. Those rights result from the natural state of man; from that situation, in which he would find himself, if no civil government was instituted. Id. at 307, 308. [See statements of founders on the natural rights. Appendix F at A-76.]

(2)

hensive and luminous commentaries on the constitution... . It drew from Washington a high encomium and gained the vote of Pennsylvania for the new government against the ingenious and captivating objections of its opponents." Bancroft is of the same opinion, Hist. of U.S., Vol. VI p. 387.

The Fourteenth Amendment itself is a source of the child's right to life. It is clear that the framers of the Thirteenth and Fourteenth Amendments equated the word "person" with "human being."[67]

Congressman John A. Bingham of Ohio, the author of Section 1 of the Fourteenth Amendment, used the word "person" interchangeably with "human being":

> The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law."...this new Magna Carta to mankind declares the rights of all to life and liberty and property; that *no person* by virtue of the American Constitution, but the majesty of American law, shall be deprived of life or liberty or property without due process of law. ...I would pass the bill, not only for the sake of giving present relief to the unfortunate *human beings* for whose special relief it is designed but I would pass this bill for the purpose as well of giving assurance...that no man shall ever, in the coming future,...be deprived of his life, of his liberty, or his property without due process of law. Cong. Globe, 37th Cong. 2d Sess. (April 11, 1862) 1683-1690. [Emphasis added].

Numerous statements show the basic assumption of the framers that "in the eyes of the Constitution, every *human being* within its sphere...from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner)

[67] Senator Lyman Trumball, Illinois, noted on the Senate floor:
I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution; ... Cong. Globe 39th Cong. 1st Sess. Dec. 19, 1865 Jan. 19, 1866, 322,323.

(first emphasis added).[68] It is clear that the framers of the Amendment intended the Due Process Clause to be coextensive with the total class of all humanity, as a constitutional codification of the natural and inalienable rights.[69] Bingham stated:

> *Natural or inherent rights, which belong to all men irrespective of all conventional regulations*, are by this Constitution guaranteed by the broad and comprehensive word 'person', as contradistinguished from the limited term citizen as in the 5th Article of Amendments...that 'no person shall be deprived of

[68] E.g., Cong. Globe, 39th Cong., 1st Sess. 77(1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives *any human being* in the land of those great rights of liberty will be in defiance of the constitution"); id. at 322-23 (Sen. Trumbull) ("great object of securing to *every human being* within the jurisdiction of the Republic equal rights before the law"); id. at 1159 (Rep. Windom) (rights to life,... are "rights of human nature," and *the most basic "right of human nature [is] the right to exist"*); id., 1151 (Rep.Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, be he old or be he young, be he innocent or be he criminal, be he learned or be he ignorant") (emphasis added).

[69] Representative James S. Brown expressed the belief that the right to life required nothing other than human existence itself:

> *[D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual?* It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels. Cong. Globe, 38th Cong., 1st Sess. 1753 (1864) (emphasis added).

Representative Joshua R. Giddings stated:

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that *every human being* holds from the Creator an inalienable right to live ...If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, *that all men, without respect to complexion or condition, hold from the Creator the right to live*, who shall determine what portion of the community shall be slain? And who may perpetuate the murders? Cong. Globe, 35th Cong., 1st Sess.App. 65-66 (1858) (emphasis in original).

> life, liberty, or property'...*Cong. Globe, 35th Cong. 2d Sess. 983 (1859)*;Similar Bingham Statement at Cong. Globe, 37th Cong. 2d Sess. 1638 (1862)(emphasis added)

Senator Arthur S. Boreman explained in regard to the then recently enacted Fourteenth Amendment:

> This ... includes every person that is found within these States, and guaranties to all life, liberty ... and equal protection of the laws. ...It is not restricted to guarantying the right of a "citizen" ...but it extends to every "person", whether he has come from another State or not, to *every person residing anywhere, everywhere,* within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended there cannot now be any longer any question on that subject. Cong. Globe, 42nd Cong., 1st Sess.App. 229 (1871).

Thus, the fundamental purpose of section one of the Fourteenth Amendment Due Process Clause was the protection of natural rights, and the clause was a "confirmatory reference" to the pre-existing "affirmative duty of government to protect [persons] in their natural rights."[70] The Due Process Clause is the consti-

[70] Because of the "inalienable" and "natural" character of the Due Process rights, Bingham and the other framers of the Fourteenth Amendment created the clause for the prupose and interest of reaffirming them as rights beyond the reach of government to withhold from any class of human beings. After careful examination of the antislavery background of the Civil War amendments and their legislative histories, one of the leading legal historians, Professor Jacobus tenBroek, wrote in his study of the Fourteenth Amendment:

> The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection in those natural rights which constitute that freedom. ...The Fourteenth Amendment reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution. ...The clause of equal protection of the laws ...(a)s the basic conception as the heart of the ... human and civil rights bills and debates upon them, as the common denom-

tutional codification of the inalienable character of life and liberty recognized by the Declaration of Independence.[71]

This Court, in speaking of the Due Process Clause, has made it clear that it constitutes the reaffirmation of the natural and inalienable rights of mankind, and the right to life is a greater right than even those deemed "fundamental," conditioned only upon the existence of those who possess the interest it protects:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. ...in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.

inator of the drafts of the Fourteenth Amendment, as the pith and substance of section 1 in its final form, this was the meaning understood and accepted by friend and foe alike. Protection of men in their fundamental or natural rights was the basic idea of the clauses; equality was a modifying condition. *The clause was a confirmatory reference to the affirmative duty of government to protect men in their natural rights*. Jacobus tenBroek, the Anti-Slavery Origins of the Fourteenth Amendment (1951) 219-221.

[71] Bingham and the other framers of the Fourteenth Amendment saw the need to create the broad unqualified class of all humanity found in the Due Process Clause (as distinguished from the "citizenship" clause) as this reaffirmation of the natural rights because the decision in *Dred Scott v. Sanford*, 60 U.S. 393 (1857) violated the duty of government to protect the natural and inalienable rights by placing qualifications upon the class of human beings protected. For a discussion of Bingham's intent to broaden the scope of Due Process Protection, beyond the Fifth Amendment, to all humanity, see *Amar, the Bill of Rights*, 101 Yale L.J. 1193 (1992); *Nelson, The 14th Amendment*, Harvard Press (1988); *Crosskey, Politics and the Constitution II*, (1953); and *Curtis, No State Shall Abridge: The 14th Amendment and the Bill of Rights*, (1986).

> ...But the fundamental rights to life, liberty, and the pursuit of happiness, *considered as individual possessions* are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws,... For, the very idea that one man may be compelled to hold his life,...at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essense of slavery itself. ...There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. *Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions*, nevertheless it is regarded as a fundamental political rights, because preservative of all rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885). [Emphasis added.]

There can be no doubt, therefore, in view of the very purpose and scope of the Due Process Clause, that the only qualification for one to enjoy the natural right to life is the existence of the individual member of the human race, the object of its protection.

3. Denying Children the Right to Live on Their Status as "Unborn" is a Denial of the Equal Protection of the Law.

Classifications that are subject to equal protection scrutiny under the Fourteenth Amendment may rise under the case law or common law of the state as well as under its legislative enactments. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 117 (1948). Where the right to life itself is involved, derived from one's existence and being "natural and inalienable," the classification to exclude a child from

a right to enjoy an interest in life based upon a status as "unborn" requires a showing of a most compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Kraemer v. Union Free School District*, 395 U.S. 621, 626-628 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

III. A WOMAN'S RIGHT MUST REFLECT AND PROTECT HER TRUE INTERESTS AND ACCOUNT FOR THE FACT THAT HER CHILD IS A HUMAN BEING AND SHE IS A MOTHER WHOSE MOST IMPORTANT PERSONAL INTERESTS ARE COMPATIBLE WITH HER CHILD'S INTEREST IN LIFE.

A. Nature and Scope of the Mother's Real Interests.

Roe identified what it perceived to be a woman's interests that the court sought to protect. However, the newly obtained scientific data concerning the child's existence and the information about the substantial harm to women due to abortion now available reveals that *Roe's* identification of a woman's protectible interests was materially deficient. Because it is the existence, nature, and "protectibility" of any interests which constitute the necessary basis for a right, their proper identification is critical.

The *Roe* Court listed five potential harms to a woman used to conclude that her *Griswold* rights include abortion. The first,

judgments when a mother's life is in danger is not implicated in this case.[72] The other concerns listed by *Roe* are: (1) maternity or additional offspring may cause a distressful life; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. *Roe*, at 153. These may be concerns that implicate the right of privacy, but they only legitimately concern decisions before a woman becomes a mother. New Jersey does not have a compelling interest to interfere with the decision of a couple concerning conception. *Griswold, supra*. However, once a mother conceives and her child is in existence her personal interests are quite different.

Even if a woman, or couple had an "interest" in avoiding the obligations of parenthood even after the child exists, that "interest" could never be protectible in a constitutional sense. It is not sufficient that one merely state a "need", a desire, or have some expectations. There must be a legitimate claim of entitlement for which there is an independent source. It is the underlying nature

[72] It was specifically found by the court that the mother's life was not in danger and conception was the result of consensual relations. Therefore, there is no need to address this interest of a woman in this prosecution of Mr. Loce.

of the "interest" which must be examined. *Board of Regents v. Roth*, 408 U.S. 564, 569-573 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 481-482 (1972); *Meachum v. Fano*, 427 U.S. 215, 224-227 (1976); *Montanye v. Haynes*, 427 U.S. 236, 242 (1976).

In *Roth, supra*, this court explained:

> ...the range of interests protected ... is not infinite ... We must look to see if the interest is within the Fourteenth Amendments' protection of liberty ..." 408 U.S. at 569, 571.

The determining factor on which the protectibility of an interest turns is the precise nature underlying the interest, not that there is a "greivous loss", but an interest of the protectible kind. *Morrissey v. Brewer, supra*, 481; *Bd. of Reg. v. Roth, supra*, 569-574. The interest must have a source in law or the nation's history or tradition. *Meachum v. Fano, supra*, 224-227; *Mantanye v. Haynes, supra*, 242; *Smith v. Organ. of Foster Fam. for E & Reform*, 431 U.S. 816, 839-847; 857-859 (1977); *Ingrahm v. Wright*, 430 U.S. 651, 672-673; *Codd v. Velger*, 429 U.S. 624-628 (1977); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 1001-1003 (1984).

The true nature of a woman's interest must be scrutinized, in view of the fact of the child's existence and the harms to a mother which have come to light during two decades of experimentation with abortion. No matter which rhetoric is used to characterize a

mother's or couples' interest to avoid the obligations of parenthood once the child exists, the "interest" [in "abortion" or "choice"] is, in fact, an "interest" in terminating the life of a human being. The interests found in *Roe* no more justify terminating the life of the child before birth then they would two days after birth to avoid the stress of child rearing. *See, Thornburgh v. A.C.O.G.*, 476 U.S. at 787-795 (White, J., dissenting).[73]

When a woman or couple intentionally conceive or conceive through voluntarily conduct, the interests listed in *Roe* are not

[73] If these were truly reasons to abort a child then a father would have a coexisting right to demand an abortion. All of these [except "maternity"] are experienced by him even when the child is born out of wedlock. The fact that a mother is the parent who carries the child does not alone give her the singular power over life and death. Both parents are equal contributors to life, with equal obligations following birth. The significant contribution of a mother who bears the burden of maternity is fairly and justly reflected in the New Jersey law which vests in her the right to choose to be the primary custodian of the child if the parents are separated at birth and disagree on custody. *Baby M*, 537 A.2d 1227, 1261 (1988). The fact that she carries and bonds with the child directly bears upon the health and welfare of the mother and child following birth, not the power over actual life itself. See IIIC below.

Casey elaborates on the concern pertaining to maternity:

> "The mother who carries a child to term is subject to anxieties, the physical constraints, to pain that only she must bear." *Casey*, 112 S.Ct. at 2807.

But *Casey* does not suggest that this justifies taking the life of another human being. *Casey* recognizes that the interest in protecting the life of the unborn at "viability" is greater than that of the mother. Yet "viability" is precisely when these anxieties, physical constraints and pains are realized in their most acute form. *Casey* recognized that the responsibility for the avoidance of this experience, if desired, rests upon the mother before they are realized. The same reasoning applies before conception. *Casey* observes that cutting off the mother's right to abortion has a "sense of fairness"... "In some broad sense it might be said that a woman who fails to act before viability has consented to the state intervention on behalf of the developing child." 112 S.Ct. at 2817.

merely irrelevent, they no longer exist. The key difference is the fact that the child exists. Even if a mother had an "interest" in terminating her child's life, it is not protectible because it is perfectly repugnant to all of her traditionally recognized and protectible interests, including her interests in her child's actual life, and her relationship with her child [see, IIIC below].

B. Identifying the Real Nature of the Life in Question.

The fact that the child is a human being is pertinent to both the child's personal interest in actual life, and the interests of the mother. The court's prior inability to determine when the life of the child began impaired its ability to accurately identify the true interests of the critical participants. As a result, ever since *Roe* declined to find when life began, the Court has labored under the disability of having never defined the nature of the life which was the subject of its opinions and the basis for an "interest" of the states. This failure and the resultant and substantial uncertainty surrounding the nature of the life is reflected in the language of the Court and imprecise definition of the "state's interest" and those of the mother. The Court most often refers to the child as "potential life" and the state's interests as one in 'potential life'. *See, e.g., Roe*, 410 U.S. at 163 (1973); *Webster v. Reproductive*

Health Services, 492 U.S. 490 (1989).[74] Nowhere is this failure and uncertainty more apparent than in *Casey*:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and depending on one's beliefs, for the life or potential life that is aborted. 112 S.Ct. at 2807.

Either this is a human being or it is not. It is not a "belief", religious or otherwise, but a question of fact. It affects the nature of a mother's interest. Whether or not she is killing her own child is material, if not decisive.

C. Once a Woman Conceives and her Child Exists her Personal Interests are Consistent with the Interests of her Child.

Once a woman conceives she has at least seven interests not identified in *Roe*, none of which are inconsistent with her child's interest in life, and all conflict with the *Roe* "interests." The first

[74] In *Casey* the Joint Opinion refers to the child as: "the life or potential life" (112 S.Ct. at 2807); "postconception potential life" (at 2811); "fetal life" (at 2811); "the life of the unborn" (at 2816); "life" (at 2816); "life or potential life of the unborn" (at 2817); "potential life" (at 2817); and "the life of the fetus that may become a child" (at 2804). The Chief Justice refers to the child as "a fetus" (at 2859); "unborn human life" (at 2867); "unborn life" (at 2868) and "unborn child" (at 2871); Justice Stevens retains the use of "potential life" (at 2840, 2841); Justice Blackmun refers to "potential life" (at 2847) and "prenatal life" (at 2847). Justice Scalia observes on this:

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. Scalia, J. dissenting, 112 S.Ct. at 2875.

three, although distinct, are closely related. First, she has a personal interest in her protected relationship with her child. Second, she has a personal interest in the child's life. Third, she has an interest in defending and protecting her child's rights. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kraemer*, 455 U.S. 745 (1982); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Matter of Baby M*, 537 A.2d 1227 (N.J. 1988); *D.Y.F.S. v. A.W.*, 512 A.2d 438 (N.J. 1986). The fact that the child is a human being distinguishes two separate sets of interests: those which form the basis for her fundamental right to companionship with her child — and those which form the basis of her *Griswold* rights. Her relationship with her child is protected during pregnancy. C.F. *Lehr, supra*. No government could demand she terminate that relationship without due process. *Santosky, supra*. The nature of this right is to preserve the life of the child and their relationship. It is not possible that her companionship interest, because of its nature, entitles her to terminate the child's life because the existence and preservation of that right hinges on the child's welfare.[75] A mother's rela-

[75] The nature of the mother's right to the protection of her relationship with her child is best understood by examning the constitutional principles concerning the termination of those protected rights. Two areas of inquiry determine whether a particular termination is constitutional: (a) whether the parent possesses a

tionship with her child during pregnancy is the most intimate, most unique, most important, and one most worthy of protection. Although the mother and child are two separate persons their relationship is so intimate that the unique bond between them, beginning as it does in utero,[76] creates a human relationship which

constitutional right; and (b) whether the grounds for termination satisfy Due Process criteria. In both inquiries, the welfare of the child is the most critical determinant. The grounds for termination have always been related to what is best for the child: only if continuing the relationship would be harmful to the child, could a termination take place. *E.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *see Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983). A second inquiry is whether a parent has a constitutionally protected relationship with the child. Here too, the welfare of the child is a critical factor. A father of a child born out of wedlock enjoys a constitutionally protected relationship with his child. *Stanley v. Illinois*, supra. But, a natural father is not always recognized as having a constitutionally protected relationship. *See Quilloin v. Walcott*, supra; *Lehr v. Robertson*, supra; *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Quilloin, supra,* explains under what circumstances the Court would recognize an unwed father's right:

> We have little doubt that the Due Process Clause would be offended 'if the state were to attempt to force the breakup of the natural family, over the objection of parents, and their children without some showing of unfitness and for the sole reason to do so was thought to be in the child's best interest'. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, (1977). But this is not the case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition of the family already in existence, a result desired by all concerned, except the appellant. 434 U.S. at 255.

This statement explains the difference in treatment of fathers' rights in *Lehr v. Robertson, supra*. In *Quilloin, Lehr* and *Michael H.* however, the dominant reason for the Court's refusal to recognize the father's rights was because there was an existing family which sought to protect the child's welfare. Therefore, the recognition of a parent's rights relates to and depends upon whether a family exists or the mother competes to protect the child's welfare.

[76] Recent studies demonstrate that a mother's bond with her child [and the child's attachment to her] begins during pregnancy and even at its early stages. Klaus and Kennel, "The Family During Pregnancy," in *Parent Infant Bonding*, 1-2

may be the most rewarding in the human experience. Preservation of the benefits, beauty, and joy of that relationship is one of the greatest interests a woman possesses in all of life.

The fact that she is the parent who carries the baby clearly distinguishes her circumstance (and her role in reproduction) from that of the father. But the fact that her contributions are different from (and at this age of the child, outweigh) his do not make her interest inconsistent with those of the child. If anything, it creates the cherished right to protection of their relationship. The fact that the mother is the parent who carries the child has always been

(1982); Lumely, "Attitudes to the Fetus Among Primagravidae," *Australian Pediatric J.*, 106, 108 (1982). This unique mother-child relationship, with the developing bond and attachment benefits both the child and mother. It is the basis for the child's subsequent attachment and development of a sense of self. Klaus and Kennell, at 3. At the same time the bond helps the mother to transfer her interest from herself to her child, and therefore prepares her for her unique role in the child's life. Sugarman, "Parental Influences in Material Infant Attachment," 47 *Am. J. Orthopsychiatry* 407 (1977). This accounts for the the fact that a mother is the principle attachment figure for a child. Bowlby, "Attachment and Loss," Vol. I *Attachment*, at 304 (1969). Studies have demonostrated the subjective and conscious awareness that mothers have concerning their bonding with their children during pregnancy. In the second trimester 63% of women expressed attachment with the child and 92% expressed such atachment during the third trimester. Some women even expressed the attachment during the first trimeser. Lumely, "Attitudes to the Fetus Among" *Austrailian Pediatric J.*, 106, 108 (1982). Mothers talk to the fetus and stroke it. Id. at 109. The ability of the mother to make a correct assessment of the size, shape and movement of the baby increased as the pregnancy proceeds as does the sense of the separateness of the baby. Id. at 108. Increased sensitivity to the child follows experience of "quickening" when women can feel the baby move. Klaus and Kennell, *supra*, at 13; Leister, "Physhological Effects of Motherhood," at 76 (1980).

considered material to her rights following birth when she is competing for custody. This is our understanding of *Lehr*. This fact relates to human bonding and impacts upon the health of both the mother and child. New Jersey law gives the mother the right to choose to be the primary custodian when the natural parents do not live together and disagree on custody at the time of birth. *Matter of Baby M,* 537 A.2d 1227, 1261 (1988). Therefore, the fact that a mother physically carries the child relates to her rights when she seeks to protect the child. To suggest that that fact supports a right to kill the child is contrary to constitutional principles dealing with termination rights.[77] The privacy right to preserve the mother-child relationship child cannot co-exist with the right to kill the child. They are repugnant.[78]

[77] This court's opinion in *S.E. Pa. v. Casey, supra*, is not inconsistent with this understanding of the mother's interests because *Casey* never addressed the humanity of the child. *Casey* only examines the quesiton of whether a father may require his "consent" for abortion. *Casey*, 112 S.Ct. at 2830-31. Since a father's *only* interest is in preserving the child's life and their relationship he never has an interest in an abortion, so his permission could never be required. But any analysis of *Roe* and *Casey* forming grounds to terminate a father's rights, or refusing to recognize them at all, which is not consistent with the welfare of the child is at odds with precedent defining parental rights and the result of this Court never having determined when the life of the child begins. (See footnote 78).

[78] The fact that a mother's interests in her child's life and her relationship with the child prior to birth are repungnant to a perceived "interest" in killing the child [and therefore mutually exclusive] through abortion is reflected in some modern feminist literature. In her book, *Sacred Bond*, Times Books, Random House, Inc., New York, 1st ed., 1988, Phyllis Chesler observed this conflict, stating that the

Fourth, she has an interest to avoid the risk of physical and psychological harms to which she is subjected when abortion is used to satisfy interests that may have existed only before she becomes a mother. This nation's experimentation with abortion has revealed impressive evidence of profound risk of physical and psychological harms to which a mother is subjected when she acts against her interests by taking her child's life. It is now clear that destruction of the mother-child relationship by the mother taking the life of her own child places a woman at subsantially increased

"sacred bond" of a mother and child cannot be sacrificed for a right to destroy that relationshp.

> Some feminists say: "If women can't do what they want with their bodies, then we'll lose our right to abortion and pay equity." I hope not, but must women give up the right to keep our children -- a right we don't yet have -- for the right not to bear children?
>
> Some feminists say: "Patriarchal motherhood has enslaved and destroyed women-who in turn have emotionally wounded their own children. There's nothing sacred about biological reproduction or motherhood. They're examples of devalued and alienated unpaid labor. Let's organize for wages and better working conditions and get men involved in mothering. At the very least, male mothers will upgrade women's status as childcare workers."
>
> *Perhaps, but how can we deny that women have a profound and everlasting bond with the children they've birthed; that this bond begins in utero; that it is further strengthened by the experience of childbirth, breast-feeding and primary childcare, and by the socialization into motherhood that women (not men) receive?*
>
> *How can we deny that children bond with their birth mothers in utero*, and that children suffer terribly in all kinds of ways when this bond is prematurely or abruptly terminated?
>
> Acknowledging these truths does not doom women to the status of surrogate uteruses-or men to the status of sperm donors. Patriarchal "civilization" has already done so. *Sacred Bond*, at 22-23. [Emphasis added.]

risk for [1] breast cancer;[79] [2] severe depression;[80] [3] lowered

[79] Russo, J., Russo IH (1980) "Susceptibility of the Mammary Gland to Carcinogenesis II. Pregnancy Interruption as a Risk Factor in Tumor Incidence" *Am J Pathol*, 100:497-451; Ownby, H.E., et als. (1983) "Interrupted Pregnancy as an Indicator of Poor Prognosis in TI, 2, No, Mo Primary Breast Cancer" *Breast Canser Res Treat*, 3:339-344; Olsson H., et al (1991) "Proliferation and DNA Ploidy in Malignant Breast Tumors in Relation to Early Oral Contraceptive Use and Early Abortions" *Cancer*, 67:1285-1290; Olsson H., et al. (1991) "Her - 2/neu and INT2 Proto-oncogene Amplification in Malignant Breast Tumors in Relation to Reproductive Factors and Exposure to Exogenous Hormones" *J Nat Cancer Inst*, 83:1483-1487; Clark, R.M., et als. (1989) "Breast Cancer and Pregnancy: The Ultimate Challenge" *Clin Oncol Royal Coll Radiol*, 1:11-18; Salber, E.J., et als. (1969) "Lactation and Reproductive Histories of Breast Cancer Patients in Boston" 1965-66, *J Nat Cancer Inst*, 43:1013-1024; Lowe C.R. et als. (1970) "Breast Cancer and Reproductive History of Women in South Wales" *Lancet*, i:153-156; Ravnihar B., et als. (1971) "Epidemiologic Features of Breast Cancer in Slovenia" 1965-1967, *Eur J Cancer*, 7:295-306; Paffenbarger R.S., et als. (1980) "Characteristics that Predict the Risk of Breast Cancer Before and After the Memopause" *Am J Epidemiology*, 112:258-268; Segi M., et als. (1957) "An epidemiological Study on Cancer in Japan" *GANN* 48 Suppl: 1-43f; Wynder E.L., et als. (1960) "A Study of the Epidemiology of Cancer of the Breast" *Cancer*, 13:559-601; Valaoras V.G., et als. (1969) "Lactation and Reproductive Histories of Breast Cancer Patients in Greater Athens" 1965-67 *Int J Cancer*, 4:350-363; Yuasa S., et als. (1970) "Lactation and Reproductive Histories of Breast Cancer Patients in Tokyo, Japan" *Bull World Hlth Org*, 42:195-204; Lin, T.M., et als. (1971) "Epidemiology Characteristics of Cancer of the Breast in Taiwan" *Cancer*, 27:1497-1504; Soini I. (1977) "Risk Factors of Breast Cancer in Finland" *Int J Epidemiology*, 6:365-373; Choi N.W., et als. (1978) "An Epidemiological Study of Breast Cancer" *Am J Epidemiology*, 107:510-521; Toti A., et als. (1980) "Possible Indication of Breast Cancer Risk Through Discriminant Functions" *Cancer*, 46:1280-1285; Kelsey, J.L., et als. (1981) "Exogenous Estrogens and Other Factors in the Epidemiology of Breast Cancer" *J Nat Cancer Inst*, 67:327-333; Pike, M.C., et als. (1981) "Oral Contraceptive Use and Early Abortion as Risk Factors for Breast Cancer in Young Women" *Br J Cancer*, 43:72-76; Remennick, L (1990) "Induced Abortion as a Cancer Risk Factor: A Review of Epidemiological Evidence" *J Epidemiol Community Health*, 44:259-264; Vessey, M.P., et als. (1982) "Oral Contraceptive Use and Abortion Before First Term Pregnancy in Relation to Breast Cancer Risk" *Br J Cancer*, 45:327-331; Brinton L.A., et als. (1983) "Reproductive Factors in the etiology of Breast Cancer" 47:757-762; Ewertz M., et als. (1988) "Risk of Breast Cancer in Relation to Reproduction Factors in Denmark" *Br J Cancer*, 58:99-104; Yuan, J-M, et als. (1988) "Risk Factors for Breast Cancer in Chinese Women in Shanghai" *Cancer Res*, 48:1949-1953; Rosenberg, L., et als. (1988) "Breast Cancer in Relation to the Occurrence and Time of Induced and Spontaneous Abortion" *Am J Epidemiol*, 127:981-989; Howe, H.L., et als. (1989) "Early Abortion and Breast Cancer Risk Among Women Under Age 40" *Int J Epidemiol*, 18:300-304; Nishiyama, F.

self esteem;[81] [4] suicide, suicidal ideation, attempted suicide and

(1982) "The Epidemiology of Breast Cancer in Tokushima Prefecture" *Shikoku Ichi (Shikoku Med J)*, 38:333-343 (Tr. Frank C., Farnham Co., Philadelphia); Dvoirin, V.V., et als. (1978) "The Role of Reproductive History in Breast Cancer Causation" in *Methods and Results of Studies of Breast Cancer Epidemiology*, Tallinn, 53-56 (in Russian, reported by Remennick, 1990 [ref #24]); Lindefors-Harris B-M, et als. (1989) "Risk of Cancer of the breast After Legal Abortion During the First Trimester: A Swedish Register Study" *Br Med J*, 299:1430-1432; Lindefors-Harris B-M, et als. (1991) "Response Bias in a Case-control Study: Analysis Utilizing Comparative Data Concerning Leagal Abortions From Two Independent Swedish Studies" *Am J Spidemiol*, 134:1003-1008; Adanii H-O, et als. (1990) "Absence of Association Between Reproductive Variables and the Risk of Breast Cancer in Young Women in Sweden and Norway," *Brit J Cancer*, 62:122-126; Parazzini F., et als. (1991), "Spontaneous and Induced Abortions and Risk of Breast Cancer," Br J Cancer, 53:281-284; Harris J.R., et als. (1992) "Breast Cancer", *N Engl J Med*, 327:319-328.

[80] Major, B. et als. (1985) "Attributions, Expectations and Coping with Abortion," in *Journal of Personality & Social Psycology*, 48, 3, 585-599; Louis Harris & Assoc. (April 20, 1993), "The Health of American Women," commissioned by the *Commonwealth Fund*; David, et al., "Postpartum and Postabortion Psychotic Reactions," in *Family Planning Perspectives*, (1981) 88-91; Reardon, *Aborted Women - Silent No More*, (Chicago; Loyola University Press, 1987); Reardon "Criteria for Identification of High Birth Abortion: Analysis of an in-depth survey of 100 aborted women "presented at the 1987 Paper Seminar of the Association for Inter-Disciplinary Research, Denver.

[81] Russo, N. & Zierh, K. (1992) "Abortion, Childbearing and Women's Well-Being," in *Professional Psychology: Research & Practice*, 23, 4, 269-280; Speckland, A. (1987), *Psycho-Social Stres Following Abortion*, Kansas City, MO: Sheed & Ward; Bradley, C. (1984), "Abortion and Subsequent Pregnancy," in *Canadian Journal of Psychiatry*, 29, 494; Dagg, P. (1991) "The Psychological Sequelae of Therapeutic Abortion," *American Journal of Psychiatry*, 148, 4, 578-585; Armsworth, M. (1991) "Psychological Response to Abortion," *Journal of Counseling & Development*, 69, 377-379; Zolese, G. & Blacker, C. (1992) "The Psychological Complications of Therapeutic Abortion," *British Journal of Psychiatry*, 160, 742-749; Adler, N., et als. (1992) "Psychological Factors in Abortion" *American Psychologisst*, 47, 10, 1194-1024; Wilmoth, G., de Alteriis, & Bussell, D. (1992) "Prevalence of Psychological Risks Following Legal Abortion in the U.S.: Limits of the Evidence," *Journal of Social Issues*, 48, 3, 37-66; Speckland A. (1987) *Psycho-social Stress Following Abortion*, Kansas City, MO: Sheed & Ward; Bradley, C. (1984) "Abortion and Subsequent Pregnancy," in *Canadian Journal of Psychiatry*, 29, 494; Open Arms, (1993) *Abortion Information Survey Project*, Columbia, MO: P.O. Box 1056; Akron Pregnancy Service (1993), *Post-Abortion Research Project*, Akron, Ohio: 105 E. Market St.

paranoid ideations;[82] [5] drug or alcohol abuse;[83] [6] negative impact on marital relations;[84] [7] negative feelings regarding subsequent pregnancies and obsessive thoughts about replacement children;[85] [8] stress disorders;[86] [9] sexual dysfunctions;[87]

[82] Campbell, et als. (1988) "Abortion in Adolescence," in *Adolescense,* 23, 92, 813-823; Garfinkel, B., et als. (1986) "Stress, Depression and Suicide: a Study of Adolescents in Minnesota," in *Responding to High Risk Young,* Minnesota Extension Service: University of Minnesota; Reardon, D. (1987), *Aborted Women: Silent No More,* Westchester, ILL: Crossway; Vaughan, H., *Canonical Variates of Post-Abortion Syndrome,* Portsmouth, N.H.; Institute for Aborting Recovery & Research; 1991; *Open Arms AIS Project, supra., Akron Pregnancy Service Survey, supra.*; Freeman, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions" in *Obstetrics & Gynecology,* 55, 5, 625-635.

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[85] Bradley, C. (1984) "Abortion and Subsequent Pregnancy" in *Canadian Journal of Psychiatry,* 29, 494; Speckhard, A. (1987) *Psycho-Social Stress Following Abortion,* Kansas City, MO; Sheed & Ward; Pare and Raven, "Follow-up of Patients Referred for Termination of Pregnancy," *The Lancet* (1970) Vol. I pg. 35-638; Wallerstein, et al., Id. Reardon, *Aborted Women - Silent No More,* Chicago: Loyola University Press, 1987; Vaughan, Id.

[86] Akron Pregnancy Service (1993), *Post-Abortion Research Project,* Akron, OH; 105 E. Market Street; Russo, N. & Zierk, K. (1992) "Abortion, Childbearing and Women's Well-Being." *Professional Psychology; Research & Practice,* 23, 4, 269-280; Dagg, P. (1991) "The Psychological Sequelae of Therapeutic Abortion," *American Jouranl of Psychiatry,* 148, 5, 578-585; Armsworth, M. (1991) "Psychological Response to Abortion," *Journal of counseling & Development,* 69, 377-379; Zolese, G. & Blacker, C. (1992) "The Psychological Complications of

[10] grief reactions;[88] [11] nervous and sleep disorders;[89] [12] and other physical and psycological injuries too numerous to detail.[90] Fifth, she has an interest in preserving her personal dignity in her role as mother, a role that does not simply "ennoble" her, or merely enrich her life, but one which distinguishes her as unique as the mother of the unique person she carries. A legal

Therapeutic Abortion," *British Journal of Psychiatry,* 160, 742-749; Adler, N., et als. (1992) "Psychological Factors in Abortion," *American Psychologist,* 47, 10, 1194-1204; Hanley, et als. (1992) *Woman Outpatients Reporting Continuing Post-Abortion Distress: A Preliminary Inquiry,* Paper Presented at the Eighth Annual Meeting of the International Society for Traumatic Stress Studies, Los Angeles; Barnard, C., *The Long Term Psychosocial Effects of Abortion,* Portsmouh, N.H., Institute for Abortion Recovery & Research, 1990.

[87] Reardon, *Aborted Women - Silent No More, supra*; Franache, *The Ambivalence of Abortion,* New York, Random House, 1978; Speckland, H. (1987); *Psycho-Social Stress Following Abortion,* Kansas City, MO: Sheed & Ward.

[88] Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" Omega 18:1 (1987), 1-12; Reardon, *Aborted Women - Silent No More, supra;* Reardon, "Criteria for Identification of High Risk Abortion Patients: Analysis of an In-Depth Survey of 100 Aborted Women," supra.

[89] Ashton, J. (1980) "The Psychosocial Outcome of Induced Abortion," in *British Journal of Obstetrics & Gynecology,* 87, 1115-1622; Akron Pregnancy Service, supra; Freemard, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions," in *Obstetrics & Gynecology,* 55, 5, 625-635.

[90] Many of these harms are inherent to abortion or the breaking of the mother-child bond developed during pregnancy, such as the grief reactions in abortion. See, generally, Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" *Omega* 18:1 (1987), 1-12; the other injuries cited above are inherent in the abortion conduct because it acts against the natural interests of the mother. The study in two Canadian provinces which found that 25% of "aborted" women made visits to psychiatrists as compared to 3% of the control group is typical. See, Badgley, et als. (1977) Report of the Committee on the Operation of the Abortion Law, *Ottowa: Supply and Services,* 313-321. See Krail pet. pt. II.

policy which denigrates her role in carrying her child is not one which actually protects her interests but destroys them. There is a difference between the experiences of women and men in the role of reproduction that must be accounted for to define a women's true interests.[91] The expectation that women conform in their conduct in the ways expected of men ignores and denigrates a mother's experience during pregnancy.[92] To pretend that she can deny her true experience to meet these expectations is cruel. To establish a formal policy which chooses to protect the destruction of her relationship with her child over a policy which unwavingly protects it is a denigration of women, because a policy

[91] A woman's sense of personhood, personal satisfaction, pleasure, effectiveness and a sense of worth is most often grounded in personal relationships and a sense of connection with others. This sense of connection leads to an increase in vitality, aliveness and energy. Women also have a heightened sense of empathy and this ability enhances rather then diminishes them. Miller, *New Physiology of Women* (1986). Women's focus on their relationships to others, an important aspect of their lives, is associated with the mother-child relationship. She has a strong interest in preserving this aspect of herself. Blenesky, Clinchy, Goldberger and Tarule, *Women's Ways of Knowing*, at 1-7 (1986). Gilligan, *In a Different Voice*, at 23 (1982), writes that the elusive mystery of women's development lies in its recognition of the continuing importance that attachment has in the human life cycle. Gilligan, supra, at 9-10, noted that there are differences in the ways men and women define themselves in relationship to others. A society which offered woman the "remedy" of abortion in reality has an unjustified expectation that she act in a detached manner characteristic of men, at the expense of her own interest, dignity, and her relationship with her child.

[92] A male dominated society artificially prizes autonomy and independence; a women's development and role as mother is denigrated and devalued in such an environment. Miller, *What do We Mean by Relationships*, 22 Work in Progress, Stone Center, Wellesly College 1, 16 (1986).

which assumes it is a distressing experience to be a mother is a statement that it is bad to be a woman.

Sixth, she has an interest in not being exploited by pressures which destroy her interests as mother as a way to satisfy the interests of third parties, including the State, the father, and others, who have personal interests inconsistent with those of mother and child. Abortion is an exploitation of women. It treats the mother as if she is not a whole woman. It assumes she can be sexually exploited and act as though she is not, in fact, a mother. It demands she detach herself from her experience and her bond, love, and sense of duty to herself and her child.[93] It expects a mother to prevent the bonding process despite the fact this natural process is both psychological and physiological.[94] It *uses* the

[93] Feminists who oppose abortion see it as a male institution which encourages, even forces a woman to act irresponsibly, against her self-interest, her dignity and self-worth, just as men often do in reducing women as "sport" and "entertainment." Newman, B., "Why Post-Modern Patriarchy Loves Abortion," in *Sisterlife,* (1993) Vol. XIII, 1, p.1, 5; great feminist leaders like Susan B. Anthony, deplored abortion as an exploitation of women, calling it "child murder," [The Revolution, 4(1):4 (July 8, 1869)] and the result of the use of women as sport [Anthony, Marriage and Maternity," *The Revolution,* 4 (1)4, 1869].

[94] "Men tend to take abortion lightly; they...fail to realize the values involved. The woman who has recourse to abortion is disowning feminine values, her values...Women learn to believe no longer in what men say...the one thing they are sure of is the rifled and bleeding womb, these shreds of crimson life, this child that is not here." Simone deBeauvoir, *The Second Sex*, 1952; "Abortion is violence: a deep, desperate violence inflicted by a woman upon, first of all, herself. It is the offspring, and will continue to be the accuser, of a more

mother as a sexual object without regard for the harm abortion can cause her.[95] It allocates all of the risk, guilt, physiological and physical pain to her and further isolates her in her distress in circumstance of unplanned or imprudent pregnancy by placing the responsibility of killing her child entirely upon her.[96]

Perhaps worst of all is the fact that a mother is deprived of any meaningful consent to the destruction of her cherished and sacred relationship with her child. Where mothers express their intentions during pregnancy to terminate their relationships with their children, no state permits enforcement of a mother's oral or written statement to surrender her child until after birth because, in every instance, regardless of the counseling, her decision before birth, is uninformed. New Jersey has found that any promise or decision by a mother to terminate her relationship with her child made before

pervasive and prevalent violence, the violence of rapism." Adrienne Rich, *Of Women Born*, 1976.

[95] "It is typical of the contradictions that break women's hearts that when they avail themselves of their fragile right to abortion they often, even usually, went with grief and humiliation to carry out a painful duty that was presented to them as a privilege. Abortion is the latest in a long line of non-choices that begin at the very beginning with the time and the place and the manner of lovemaking..." Germaine Greer, *The New Republic,* interview, October 5, 1992.

[96] See discussion of psychiatric harm above. Dr. Alice Ruben Stockharm wrote of this isolation. See, Stockharm, A., *Takology* (1887), p. 247.

birth is uninformed as a matter of law. *Matter of Baby M*, 537 A.2d 1227, 1247-1248 (N.J. 1988). If that is true where a mother gives birth, it is more so where she irrevocable kills her own child and must live with the consequences. Abortion also fails to recognize the reality that most women who originally intend to surrender children to adoption (because of the *Roe* "interests") change their mind. Abortion is repugnant to every policy that New Jersey has adopted to protect the relationship a woman has with her child-policies created to protect her interests [see Krail Pet. IID]. She is subjected to these harms only to accommodate society's sexual exploitation because it was easier for that society to create an industry of abortion than to correct the underlying exploitive conduct.

Seventh, she has an interest in having the law extend to her dignity and respect by recognizing that she is capable of competing equally, competitively and with dignity in the commercial and professionial life of this nation without being denigrated by specially and artificially crafted "principles of law" which ingrain the belief that she is inherently inferior because she cannot find fulfillment without an exclusive "right" to terminate the life of her own child.

Once the child exists a mother's interests are compatible with

the child's personal interest in actual life. If it were erroneously perceived that a mother had interests, after the child comes into existence, such as those set forth in *Roe*, they would not be constitutionally protectible. A parent's willingness to surrender the benefits of her relationship with the child to avoid the obligations of parenthood cannot rise to the level of a protectible interest if avoidance of the responsibility is accomplished by the termination of the child's life. That it is convenient, easier or less expensive to terminate the life of the child during any stage of pregnancy "cannot stand against the preciousness of a single human life." *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (1967). The "interest" in killing a child is simply unprotectible in the constitutional sense, and mutually exclusive with a mother's constitutionally protected interest in her child's life. All of New Jersey's longstanding policies to protect the life of the child and the mother's relationship with the child precludes recognition of an "interest" in the termination of the child's life as protectible. [See, Krail pet. IID].[97]

[97] Even if a woman actually has a protectible "interest" to terminate her child's life, when balanced against the child's interest in actual life, the child's life would have to be preserved because the interests are in conflict and the child would suffer the greatest loss. Compare, *Zacchini v. Scripps - Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).

IV. MR. LOCE HAS THE STANDING TO RAISE THE RIGHTS OF HIS CHILD. CONVICTION OF HIM UNDER THE FACTS OF THIS CASE IS AN UNCONSTITUTIONAL DEPRIVATION OF THE RIGHTS OF BOTH THE CHILD AND MR. LOCE.

Mr. Loce's relationship with his child is unique because both have the interwoven common interest in the child's life. The child's interest in life coincides with the father's interest to defend his child's life. The fact of the child's existence and the nature of the child's rights, given Mr. Loce's standing in regard to them, render Mr. Loce's conviction an unconstitutional deprivation of the child's rights. See e.g., *Griswold v. Connecticut*, 381 U.S. at 481.[98]

"Standing" is an element of the "adverse parties" requirement of Article III and concerns whether the party seeking relief has:

> Alleged such a personal status in the outcome of the controversy as to assure that concrete adverseness which sharpens the preservation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Standing relates to the inextricable connection between the rights of both father and child, because they relate to the harm each shall endure, and the right each separately possesses to have

[98] e.g. see also, *Truax v. Raich*, 239 U.S. 33 (1915) (an employee may assert the rights of his employer); *Pierce v. Society of Sisters*, 268 U.S. 510 (the owners of private schools could assert the rights of potential pupils and their parents); and *Barrows v. Jackson*, 346 U.S. 249 (a white defendant, party to a racially restrictive covenant, could raise the rights of prospective negro purchasers, although no negro was a party to the suit).

the father stand in place of the child. This Court has often recognized the standing of a litigant to prosecute the rights of another if the litigant demonstrates: [1] a degree of injury to himself, and [2] that, under the circumstances present, the injured parties whose rights they seek to litigate would probably be unable to assert their own rights. See e.g., *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Craig v. Boren*, 429 U.S. 190, 192-197 (1976); *Carey v. Population Services Intl.*, 431 U.S. 678, 682-684 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The policy underlying these requirements was best stated in *Singleton v. Wulff*, 428 U.S. 106 (1976). With respect to the first requirement *Singleton* states:

> If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. 428 U.S. at 114, 115.

Here Mr. Loce sought only to protect his child's life. It matters not that he was prosecuted under a general trespass statute: the

activity in which he engaged was that of preventing the death of his child. The day before he petitioned the Court to enjoin the termination of the child's life. The purpose and intent of his activity at the clinic on September 8, 1990 cannot be mistaken. For its part, the State of New Jersey made it clear that the conviction by the State was in furtherance of a "constitutionally protected abortion" guaranteed by *Roe* and *Casey* [A-86-88]. The harm to Mr. Loce could not be more apparent: he [1] was criminally prosecuted for asserting the rights of his child; [2] lost the enjoyment of the relationship with his child [99]; and [3] the child's life, in which he enjoyed an interest, was irreparably lost by his arrest.[100]

[99] In addition to his prosecution, the harm to Mr. Loce is directly related to his child's rights. A father has a profound interest in his child's welfare. Whether or not they are directly and substantively implicated, the father's Constitutional rights to [1] companionship and association (e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kraemer*, 455 U.S. 745 (1982) "...the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"); [2] equal protection, (e.g. *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); [3] procreate (e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942); [4] discharge his obligation to his children (e.g. *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925)); and [5] defend life (e.g., *Art. 1, §1, N.J. Const. 1947*; Due Process Clause, Fourteenth Amendment U.S. Const.), surely form the foundation to distinguish his relationship with the child as unique and sufficient to create in him standing to speak for his child. *Griswold, supra*.

[100] A father's conviction and loss of his child's life (and the destruction of his own rights to defend his child, maintain a relationship with his child, procreate, equal protection, and to discharge his duties to his child) is a harm to him of a greater magnitude than loss of money (e.g. *Singleton v. Wulff, supra*.); subjection to money damages (*Barrows v. Jackson, supra*.); expulsion from a private club

The second requirement of *Singleton* is satisfied as in no other circumstance. Unlike every other instance, if standing is not recognized by someone other than the individuals whose rights the petitioner seeks to raise (those of the child prior to birth) then the rights of those individuals could never be prosecuted or protected. The conviction of Mr. Loce is an unconstitutional deprivation of his child's rights because the right would otherwise go entirely unprotected. However, only a mere showing that the rights of the parties would be adversely affected, not entirely denied, is sufficient for an acquittal. The harm to Mr. Loce (conviction and loss of his child's life and their relationship) and the total denial of his child's rights are more destructive to him and his child's rights than that found in any other case reported by this Court. In *Singleton, supra*, a doctor was *merely threatened* with the loss of money only, and the persons whose rights he sought to protect were capable of litigating their own rights. The mere "chilling" of the women's

(*Sullivan v. Little Hunting Park, supra.*); compulsion to convey property (*Buchanan v. Warley, supra.*); or potential exposure to criminal charges for conduct voluntarily engaged in to earn money (*Doe v. Bolton*, 410 U.S. 179, 188-189 (1973)). If this Court recognizes the standing of doctors who assist in terminating the life of children, then clearly the Court, by the same principles of law, must recognize the standing of a father who seeks to save his child's life.

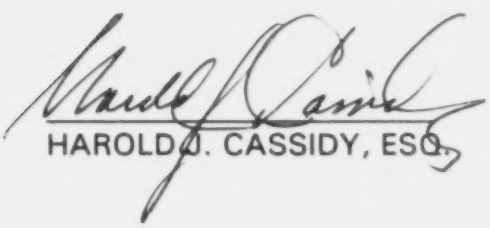
ability to assert their right was sufficient infringement of it to condemn the State's action. In *Doe v. Bolton*, 440 U.S. 179 (1973) a Georgia statute which *merely threatened* prosecution of a doctor was declared by the Court to be an unconstitutional infringement of a "patient's" rights despite the fact that [1] the doctor was not himself prosecuted, and [2] pregnant women were themselves parties in the same action. The combination of the mere threat of prosecution to the doctor combined with mere "restriction" of the women's rights rendered the statute against the doctor unconstitutional.[101] In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the prosecution of the Executive Director and Medical Director of a clinic was declared to be an unconstitutional deprivation of the privacy rights of couples. This Court, in short, has held that if a state's interest, intrudes upon or violates an individual fundamental right, it cannot form the basis of a criminal

[101] Refusal to recognize the father's standing to raise his child's rights would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. New Jersey extends the defense of a defendant's act as being necessary to defend the life of others in every other instance, and the conviction of Mr. Loce is solely based upon the classification of persons only on their status as "unborn". See affirmative defenses for protecting other persons under *N.J.S.A.* 2C:3-5; *N.J.S.A.* 2C:32-2; *N.J.S.A.* 2C:3-10; *N.J.S.A.* 2C:30-8; and *New Jersey State Constitution Article 1, Section.1* (right to defend life). See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

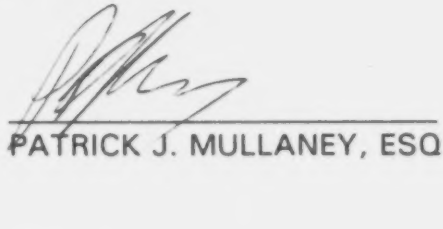
prosecution. The Appellate Division held that the constitutional right extended Ms. Z to terminate the child's life was the basis of Mr. Loce's conviction, and the interest the state sought to advance. The father in this case raised the child's rights in both a civil suit on September 7, 1990, and in this case where the state acted to protect the mother's "interest" to take the life of her own child. The removal of Mr. Loce from the clinic, his arrest and prosecution, all designed to further the goal of terminating the child's life is a profound unconstitutional deprivation of the child's natural and inalienable rights, and those codified by the Due Process and Equal Protection Clauses.

CONCLUSION

The issues presented by this case have never been decided by this Court and are of such public importance that the court must grant the writ of certiorari and decide them.



HAROLD J. CASSIDY, ESQ.



PATRICK J. MULLANEY, ESQ.

APPENDIX A

LIST OF ONE HUNDRED AND SEVENTY-FOUR CASES WHICH THE U.S. SUPREME COURT OVERRULED PRIOR DECISIONS

1. *Hudson v. Guestier*, 6 Cr. (10 U.S. 281, 285 (1810) (overruling *Rose v. Himley*, 4 Cr. (8 U.S.) 241 (1808)).

2. *Gordon v. Ogden*, 3 Pet. (28 U.S.) 33, 34 (1830) (overruling *Wilson v. Daniel*, 3 Dall. (3 U.S.) 401 (1798)).

3. *Greene v. Lessee of Neal*, 6 Pet. (31 U.S.) 291 (1832) (overruling *Patton v. Easton*, 1 Wheat. (14 U.S.) 476 (1816); *Powell's Lessee v. Harmon*, 2 Pet. (27 U.S.) 241 (1829)).

4. *Louisville Railroad Co. v. Letson*, 2 How. (43 U.S.) 497, 554-556 (1844) (overruling *Commercial and Railroad Bank v. Slocomb*, 14 Pet. (39 U.S.) 60 (1840) and *Strawbridge v. Curtiss*, 3 Cr. (7 U.S.) 267 (1806); *Qualifying Bank of the United States v. Deveaux*, 5 Cr. (9 U.S.) 61 (1809)).

5. *The Genessee Chief*, 12 How. (53 U.S.) 443, 456 (1851) (overruling *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825); *The Orleans v. Phoebus*, 11 Pet. (36 U.S.) 175 (1837)).

6. *Gazzam v. Phillip's Lessee*, 20 How. (61 U.S.) 372, 377-378 (1858) (overruling *Brown's Lessee v. Clements*, 3 How. (44 U.S.) 650 (1845)).

7. *Suydam v. Williamson*, 24 How. (65 U.S.) 427 (1861) (overruling *Williamson v. Berry*, 8 How. (49 U.S.) 495 (1850); *Williamson v. Irish Presbyterian Congregation*, 8 How. (49 U.S.) 565 (1850); *Williamson v. Ball*, 8 How. (49 U.S.) 566 (1850)).

8. *Mason v. Eldred*, 6 Wall. (73 U.S.) 231, 238 (1868) (overruling *Sheehy v. Mandeville*, 6 Cr. (10 U.S.) 253 (1810)).

9. *The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869) (overruling *Allen v. Newberry*, 21 How. (62 U.S.) 244 (1858) (in part)).

10. *Knox v. Lee* (The Legal Tender Cases), 12 Wall. (79 U.S.) 457, 553 (1871) (overruling *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870)).

11. *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871) (overruling *Roosevelt v. Meyer*, 1 Wall (68 U.S.) 512 (1863)).

12. *Hornbuckle v. Toombs*, 18 Wall. (85 U.S.) 648, 652-653 (1874) (overruling *Noonan v. Lee*, 2 Bl. (67 U.S.) 499 (1863); *Orchard v. Hughes*, 1 Wall. (68 U.S.) 73, 77 (1864); *Dunphy v. Kleinsmith*, 11 Wall. (78 U.S.) 610 (1871)).

13. *Union Pac. R. Co. v. McShane*, 22 Wall. (89 U.S.) 444 (1874) (overruling *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (83 U.S.) 603 (1873) (in part)).

14. *County of Cass v. Johnston*, 95 U.S. 360 (1877) (overruling *Harshman v. Bates County*, 92 U.S. 569 (1875)).

15. *Fairfield v. County of Gallatin*, 100 U.S. 47 (1879) (overruling *Town of Concord v. Savings-Bank*, 92 U.S. 625 (1875)).

16. *Tilghman v. Proctor*, 102 U.S. 707 (1880) (overruling *Mitchell v. Tilghman*, 19 Wall. (86 U.S.) 287 (1873)).

17. *Kilbourn v. Thompson*, 103 U.S. 168, 192-200 (1881) (overruling *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204 (1821)).

18. *United States v. Phelps*, 107 U.S. 320, 323 (1883) (overruling *Shelton v. The Collector*, 5 Wall. (72 U.S.) 113, 118 (1867)).

19. *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 387 (1883) (overruling *Stafford v. The Union Bank of Louisiana*, 16 How. (57 U.S.) 135 (1853)).

20. *Morgan v. United States*, 113 U.S. 476, 496 (1885) (overruling *Texas v. White*, 7 Wall. (74 U.S.) 700 (1869).

21. *Wabash, S.L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (overruling *Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877) ("substantially though not expressly overruled")).

22. *Phila. Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887) (overruling *State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284 (1873) ("basic grounds of decision repudiated")).

23. *In re Ayers*, 123 U.S. 443 (1887) (overruling *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824)).

24. *Leloup v. Port of Mobile*, 127 U.S. 640, 647 (1888) (overruling *Osborne v. Mobile*, 16 Wall. (83 U.S.) 479 (1873)).

25. *Leisy v. Hardin*, 135 U.S. 100, 118 (1890) (overruling *Peirce v. New Hampshire*, 5 How. (46 U.S.) 504 (1847)).

26. *Brenham v. German-American Bank*, 144 U.S. 173, 187 (1892) (overruling *Rogers v. Burlington*, 3 Wall. (10 U.S.) 654 (1866); *Mitchell v. Burlington*, 4 Wall. (71 U.S.) 270 (1867)).

27. *Roberts v. Lewis*, 153 U.S. 367, 377 (1894) (overruling *Giles v. Little*, 104 U.S. 291 (1881)).

28. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) (overruling *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796)).

29. *Garland v. Washington*, 232 U.S. 642, 646 (1914) (overruling *Crain v. United States*, 162 U.S. 625 (1896)).

30. *United States v. Nice*, 241 U.S. 591, 601 (1916) (overruling *In re of Heff*, 197 U.S. 488 (1905)).

31. *Pennsylvania R.R. Co. v. Towers*, 245 U.S. 6, 17 (1917) (overruling *Lake Shore & M.S. Ry. Co. v. Smith*, 173 U.S. 684 (1899) (in part)).

32. *Rosen v. United States*, 245 U.S. 467, 470 (1918) (overruling *United States v. Reid*, 12 How. (53 U.S.) 361 (1851)).

33. *Boston Store v. American Graphophone Co.*, 246 U.S. 8, 25 (1918); *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502, 518 (1917) (overruling *Henry v. Dick Co.*, 224 U.S. 1 (1912)).

34. *Terrell v. Burke Constr. Co.*, 257 U.S. 529, 533 (1922) (overruling *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1877); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U.S. 246 (1906)).

35. *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653, 659 (1923) (overruling *Ex parte Wisner*, 203 U.S. 449 (1906); qualifying; *In re Moore*, 209 U.S. 490 (1908)).

36. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925) (overruling *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)).

37. *Ches. & Ohio Ry. Co. v. Leitch*, 276 U.S. 429 (1928) (rehearing) (overruling *Chesapeake and Ohio Ry. Co. v. Leitch*, 275 U.S. 507 (1927) (not recorded)).

38. *Gleason v. Seaboard Ry.*, 278 U.S. 349, 357 (1929) (overruling *Friedlander v. Texas & Railway Co.*, 130 U.S. 416 (1889) (in part)).

39. *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 209 (1930) (overruling *Blackstone v. Miller*, 188 U.S. 189 (1903)).

40. *East Ohio Gas Co. v. Tax Comm.*, 283 U.S. 465, 472 (1931) (overruling *Penna. Gas Co. v. Pub. Service Comm.*, 292 U.S. 23 (1920)).

41. *Chicago & E.I.R. Co. v. Commission*, 284 U.S. 296 (1932) (overruling *Erie R.R. Co. v. Collins*, 253 U.S. 77 (1920); *Erie R.R. Co. v. Szary*, 253 U.S. 86 (1920)).

42. *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)).

43. *New York ex rel. Northern Finance Corp. v. Lynch*, 290 U.S. 601 (1933) (overruling *Macallen Co. v. Massachusetss*, 279 U.S. 620 (1929). *See also United States v. City of Detroit*, 355 U.S. 466, 472 n. 2 (1958)).

44. *Funk v. United States*, 290 U.S. 371, 373, 386 (1933) (overruling *Stein v. Bowman*, 13 Pet. (38 U.S.) 209 (1839) (in part); *Hendrix v. United States*, 219 U.S. 79 (1911); *Logan v. United States*, 144 U.S. 263 (1892); *Jim Fuey Moy v. United States*, 254 U.S. 189 (1920)).

45. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936)).

46. *R.R. Comm. v. Pacific Gas Co.*, 302 U.S. 388 (1938) (rehearing) (overruling *Railroad Commission v. Pacific Gas Co.*, 301 U.S. 669 (1937) (not recorded)).

47. *Helvering v. Producers Corp.*, 303 U.S. 376 (1938) (overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)).

48. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 69, 79 (1938) (overruling *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842)).

49. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Dobbins v. Erie County*, 16 Pet. (41 U.S.) 435 (1842); *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871); N.Y. ex rel. *Rogers v. Graves*, 299 U.S. 401 (1937); *Brush v. Commissioners*, 300 U.S. 352 (1937)).

50. *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (overruling *Proctor & Gamble v. United States*, 225 U.S. 282 (1912)).

51. *O'Malley v. Woodrough*, 307 U.S. 277 (1939) (overruling *Evans v. Gore*, 253 U.S. 245 (1920)).

52. *Madden v. Kentucky*, 309 U.S. 83 (1940) (overruling *Colgate v. Harvey*, 296 U.S. 404 (1935)).

53. *Helvering v. Hallock*, 309 U.S. 106 (1940) (overruling *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935)).

54. *Tigner v. Texas*, 310 U.S. 141 (1940) (overruling *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)).

55. *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (limited)).

56. *United States v. Chicago, M.St. P. & P.R. Co.*, 312 U.S. 592 (1941) (overruling *United States v. Lynch*, 188 U.S. 445 (1903) (in part); *United States v. Heyward*, 250 U.S. 633 (1919) (not recorded)).

57. *Nye v. United States*, 313 U.S. 33 (1941) (overruling *Toldeo Newspaper Co. v. United States*, 247 U.S. 401 (1918)).

58. *California v. Thompson*, 313 U.S 109 (1941) (overruling *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927)).

59. *United States v. Classic*, 313 U.S 299 (1941) (overruling *Newberry v. United States*, 256 U.S. 232 (1921)).

60. *Olsen v. Nebraska*, 313 U.S. 236 (1941) (overruling *Ribnik v. McBride*, 277 U.S. 250 (1928)).

61. *Alabama v. King & Boozer*, 314 U.S. 1 (1941) (overruling *Panhandle Oil Co. v. Knox*, 277 U.S. 219 (1928); *Graves v. Texas Company*, 298 U.S. 393 (1936)).

62. *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941) (overruling *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

63. *Edwards v. California*, 314 U.S. 160 (1941) (overruling *City of New York v. Miln*, 11 Pet. (36 U.S.) 103 (1837)).

64. *State Tax Comm. v. Aldrich*, 316 U.S. 174 (1942) (overruling *First National Bank v. Maine*, 284 U.S. 312 (1932)).

65. *Williams v. North Carolina*, 318 U.S. 287 (1942) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)).

66. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943) (overruling *Johnson v. Fleet Corporation*, 280 U.S. 320 (1930)).

67. *Jones v. Opelika*, 319 U.S. 103 (1943) (re-argument); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (overruling *Jones v. Opelika*, 316 U.S. 584 (1942)).

68. *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943) (overruling *Childers v. Beaver*, 270 U.S. 555 (1926)).

69. *Board of Education v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville District v. Gobitis*, 310 U.S. 586 (1940)).

70. *FPC v. Hope Gas Co.*, 320 U.S. 591 (1944) (overruling *United Railways v. West*, 280 U.S. 234 (1930 (in part)).

71. *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944) (overruling *Leeds & Catlin Co. v. Victor Talk. Mach. (no. 2)*, 213 U.S. 325 (1909) (limited)).

72. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (overruling *Plamals v. Pinar Del Rio*, 277 U.S. 151 (1928) (in part)).

73. *Smith v. Allwright*, 321 U.S. 649 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

74. *United States v. Southeastern Underwriters' Assn.*, 322 U.S. 533 (1944) (overruling *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1869); *United States v. Schwimmer*, 279 U.S. 644 (1929)).

75. *Girouard v. United States*, 328 U.S. 61 (1946) (overruling *United States v. MacIntosh*, 283 U.S. 605 (1931); *United Stats v. Bland*, 283 U.S. 636 (1931)).

76. *Halliburton Co. v. Walker*, 3298 U.S. 1 (1946) (rehearing) (overruling *Halliburton Co. v. Walker*, 326 U.S. 696 (1946)).

77. *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947) (rehearing) (overruling *MacGregor v. Westinghouse Co.*, 327 U.S. 758 (1946)).

78. *Angel v. Buelington*, 330 U.S. 183 (1947) (overruling *David Lupton's Sons v. Auto. Club of Am.*, 225 U.S. 489 (1912) (rendered obsolete by prior change in law)).

79. *Zap v. United States*, 330 U.S. 800 (1947) (rehearing) (overruling *Zap v. United States*, 328 U.S. 624 (1946)).

80. *Thibaut v. Car and General Ins. Corp.*, 332 U.S. 828 (1947) (on rehearing) (overruling *Thibaut v. Car and General Ins. Corp.*, 332 U.S 751 (1947)).

81. *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (overruling *Andrews v. Andrews*, 188 U.S. 14 (1908) (in part)).

82. *Lincoln Federal Labor Union v. Northwestern*, 335 U.S. 525 (1949) (overruling *Adair v. United States*, 208 U.S. 161 (1908)) *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (overruling *Coppage v. Kansas*, 236 U.S. 1 (1915)).

83. *Comr. v. Estate of Church*, 335 U.S. 632, 637 (1949) (overruling *May v. Heiner*, 281 U.S. 238 (1930)).

84. *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949) (overruling *St. Louis v. Ferry Company*, 11 Wall. (78 U.S.) 423 (1870); *Old Dominian Steamship Co. v. Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Co. v. Kentucky*, 202 U.S. 409 (1906)).

85. *Oklahoma Tax Comm. v. Texas Co.*, 336 U.S. 342 (1949) (overruling *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914); *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co. v Howard*, 248 U.S. 549 (1919); *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936)).

86. *Cosmopolitan Co. v. McAllister*, 336 U.S. 783 (1949) (overruling *Hust v. Moore-McCormack Lines*, 328 U.S. 707 (1946)).

87. *United States v. Rabinowitz*, 339 U.S. 56, 66, 85 (1950) (overruling *Trupiano v. United States*, 334 U.S. 699 (1948); *McDonald v. United States*, 335 U.S. 451 1948)).

88. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (overruling *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U.S. 230 (1915)).

89. *Brown v. Board of Education*, 347 U.S. 483, 491, 494-495 (1954) (overruling *Cumming v. Board of Education*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927)).

90. *In re Disbarment of Isserman*, 348 U.S. 1 (1954) (on rehearing) (overruling *In re Isserman*, 345 U.S. 286 (1953)).

91. *Gayle v. Browder*, 352 U.S. 903 (1956) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

92. *Reid v. Covert*, 354 U.S. 1 (1957) (overruling *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956)).

93. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 419 (1957) (overruling *Thompson v. Thompson*, 226 U.S. 551 (1913)). *See also Armstrong v. Armstrong*, 350 U.S. 568, 581 (1956)).

94. *Ladner v. United States*, 358 &U.S. 169 (1958) (rehearing) (overruling *Ladner v. United States*, 355 U.S. 282 (1958)).

95. *United States v. Raines*, 362 U.S. 17, 27 (1960) (overruling *United States v. Reese*, 92 U.S. 214, 220-221 (1876)).

96. *Elkins v. United States*, 364 U.S. 206, 210, 212-213, 283 (1960); *Rios v. United States*, 364 U.S. 253 (1960) (overruling *Weeks v. United States*, 282 U.S. 386, 398 (1914) (in part); *Center v. United States*, 267 U.S. 575 (1925); *Byars v. United States*, 273 U.S. 28, 33 (1927) (in part); *Feldman v. United States*, 322 U.S. 487, 492 (1944) (in part)).

97. *James v. United States*, 366 U.S. 213, 215, 221, 223, 241 (1961) (overruling *CIR v. Wilcox*, 327 U.S. 404 (1946)).

98. *Mapp v. Ohio*, 367 U.S. 643, 653-655 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949) (in part)); *See also Ker v. California*, 374 U.S. 23, 45, 53, 59 (1963) (overruling *Irving v. California*, 347 U.S. 128 (1954) (in part)).

99. *Baker v. Carr*, 369 U.S. 186, 277, 280 (1962) (overruling *Colegrove v. Green*, 328 U.S. 549 (1946) (in part)).

100. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (overruling *Colegrove v. Barrett*, 330 U.S. 804 (1947)).

101. *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962) (overruling *Westinghouse Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955) (in part)). *See also Truck Drivers Union v. Riss & Co.*, 372 U.S. 517, 520 (1963).

102. *Construction Laborers v. Curry*, 371 U.S. 542, 552, 554 (1963) (overruling *Building Union v. Ledbetter Co.*, 344 U.S. 178 (1952) (in part)).

103. *Gideon v. Wainwright*, 372 U.S. 335, (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

104. *Gray v. Sanders*, 372 U.S. 368, 383 (1963) (overruling *Cook v. Fortson, Turman v. Duckworth*, 329, U.S. 675 (1946); *South v. Peters*, 339 U.S. 276 (1950); *Cox v. Peters*, 342 U.S. 936 (1952); *Hartsfeld v. Sloan*, 357 U.S. 916 (1958)).

105. *Fay v. Noia*, 372 U.S. 391, 435 (1963) (overruling *Darr v. Burford*, 339 U.S. 200 (1950) (in part)).

106. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (overruling *Adams v. Tanner*, 244 U.S. 590 (1917)).

107. *Schneider v. Rusk*, 377 U.S. 163 (1964) (overruling *Mackenzie v. Hare*, 239 U.S. 299 (1915)).

108. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (overruling *Twining v. New Jersey*, 311 U.S. 78 (1908); *Adamson v. California*, 332, U.S. 46 (1947)).

109. *Murphy v. Waterfront Comm.*, 378 U.S. 52, 57, 77 (1964) (overruling *Jack v. Kansas*, 199 U.S. 372 (1905); *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Mills v. Louisiana*, 360 U.S. 230 (1959)).

110. *Jackson v. Denno*, 378 U.S. 368, 391 (1964) (overruling *Stein v. New York*, 346 U.S. 156 (1953)).

111. *Escobedo v. Illinois*, 378, U.S. 478, 491-492 (1964) (overruling *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958)).

112. *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (overruling *West v. Louisiana*, 194 U.S. 258 (1904)).

113. *Gold v. DiCarlo*, 380 U.S. 520 (1965) (overruling *Tyson & Bro. v. Banton*, 273 U.s. 418 (1927)).

114. *Swift & Co. v Wickham*, 382 U.S. 111 (1965) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153 (1962)).

115. *Harris v. United States*, 382 U.S. 162 (1965) (overruling *Brown v. United States*, 359 U.S. 41 (1959)).

116. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (overruling *Breedlov v. Suttles*, 302 U.S. 277 (1937); *Butler v. Thompson*, 341 U.S. 937 (1951)).

117. *Spevack v. Klein*, 385 U.S. 511 (1967) (overruling *Cohen v. Hurley*, 366 U.S. 177 (1961)).

118. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (overruling *Adler v. Board of Education*, 342 U.S. 485 (1952)).

119. *Afroyim v. Rusk*, 387 U.S. 253 (1967) (overruling *Perez v. Brownell*, 356 U.S. 44 (1958)).

120. *Warden v. Hayden*, 387 U.S. 294 (1967) (overruling *Gouled v. United States*, 255 U.S. 298 (1921)).

121. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (overruling *Frank v. Maryland*, 359 U.S. 360 (1959)).

122. *Berger v. New York*, 388 U.S. 41 (1967) (overruling *Olmstead v. United States*, 277 U.S. 437 (1928) (in part)).

123. *Katz v. United States*, 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)).

124. *Peyton v. Rowe*, 391 U.S. 54 (1968) (overruling *McNally v. Hill*, 293 U.S. 131 (1934)).

125. *Bruton v. United States*, 391 U.S. 123 (1968) (overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957)).

126. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (overruling *Maxwell v. Dow*, 176 U.S. 581 (1900)).

127. *Carafax v. LaVallee*, 391 U.S. 234 (1968) (overruling *Parker v. Ellis*, 362 U.S. 574 (1960)).

128. *Lee v. Florida*, 392 U.S. 378 (1968) (overruling *Schwartz v. Texas*, 344 U.s. 199 (1952)).

129. *Jones v. Alfred H. Mayer Co.*, 382 U.S. 409, 441-443 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

130. *Moore v. Ogilvie*, 394 U.S. 814 (1969) (overruling *MacDougall v. Green*, 335 U.S. 281 (1948)).

131. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

132. *Chimel v. California*, 395 (U.S. 752 (1969) (overruling *Harris v. United States*, 331 U.S. 145 (1947); United *States v. Rabinowitz*, 339 U.S. 56 (1950)).

133. *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1967)).

134. *Ashe v. Swenson*, 397 U.S. 436 (1970) (overruling *Hoog v. New Jersey*, 356 U.S. 464 (1958)).

135. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970) (overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)).

136. *Prince v. Georgia*, 398 U.S. 323, 329-330 (1970) (overruling *Brantley v. Georgia*, 217 U.S. 284 (1910)).

137. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (overruling *The Harrisburg*, 119 U.S. 199 (1886)).

138. *Williams v. Florida*, 399 U.S. 78 (1970) (overruling in part *Thompson v. Utah*, (170 U.S.) 343 (1898), *Rassmussen v. United States*, 197 U.S. 516 (1905)).

139. *Blonder-Tongue Labs v. Univ. of Ill. Foundation*, 402 U.S. 313 (1971) (overruling *Triplett v. Lowell*, 297 U.S. 638 (1936)).

140. *Andrews v. L. & N.R. Co.*, 406 U.S. 320 (1972) (overruling *Moore v. Ill. Cent. R. Co.*, 312 U.S. 630 (1941)).

141. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (overruling in part *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

142. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (overrulling *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Asssociation v. Greenberg*, 204 U.S. 359, 363; *See also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

143. *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962)).

144. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (overruling *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904)).

145. *Lehnkausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (overruling *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928)).

146. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (overruling *A book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1

(1966)).

147. *North Dakota Pharmacy Board v. Snyder's Drug Stores*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) (overruling *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73, L.Ed. 204 (1929)).

148. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (overruling *Shapiro v. Thompson*, 394 U.S. 6128, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (in part)).

149. *State Dept. of Health & Rehabilitative Services v. Zarate*, 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972); and *Sterrett v. Mothers' & Children's Rights Organization*, 409 U.S. 809, 93 S.Ct. 68, 34 L.Ed.2d 70 (1972):

150. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.t. 692, 42 L.Ed.2d 690 (1975) (overruling *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.21d 118 (1961) (in effect)).

151. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) (overruling *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872)).

152. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (overruling *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942)).

153. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968)).

154. *New Orleans v.Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling *Morey v. Doud*, 354 u.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957);

155. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overruling *Goesaert v. Cleary*, 335 U.S. 464,

69 S.Ct. 197, 92 L.Ed. 163 (1948);

156. *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951);

157. *Schaeffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (overruling *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878)).

158. *Dept. of Revenue of Washington v. Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2ds 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Commn.*, 302 U.S. 90, 58 S.Ct. 72, 82, L.Ed. 68 (1937)).

159. *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250 (1975)).

160. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed.793 (1896)).

161. *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (overruling *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)).

162. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (overruling *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922)).

163. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (overruling *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)).

164. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (overruling *Rolston v. Missouri Fund Comm'rs.*, 120 U.S. 390, 7 S.Ct.

499, 30 L.Ed. 721 (1887) (in part)).

165. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (overruling *Coffey v. United States*, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684 (1886)).

166. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)).

167. *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (overruling in part *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)).

168. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527, 1010 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (in part)).

169. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1868) (overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (in part)).

170. *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d364 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)).

171. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (overruling *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)(in part)).

172. *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895)).

173. *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (overruling *Procunier v. Martinez*, 416

U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (in part)).

174. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2823 (1992) (overruling *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S.; at 762, 106 S.Ct. at 2179 and Akron I, 462 U.S. 416, 103 S.Ct. 2481.

APPENDIX B

REPRESENTATIVE SCIENTIFIC AUTHORITIES WHICH CONCUR THAT LIFE BEGINS AT CONCEPTION

1. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989.

   "A single lucky sperm may succeed in fertilizing it, starting the development of a new human being." p. 587

   "Fertilization occurs as the haploid nuclei of sperm and egg fuse, forming a diploid nucleus that contains all the genes of a new human being." p. 588

2. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989.

   "Since the parents differed genetically from each other, the zygote contains the genetic blueprint, so to speak, for a unique individual." p. 247

   "Whatever the number of genes, there are obviously enough to direct the formation of the whole human animal from a fertilized egg ... ." p. 288

   "An additional source of variation arises when a sperm and an egg unite. This recombination of a genetic materials adds to the pool of variation because no two eggs or sperm cells carry precisely the same genes. Therefore each recombination creates a unique individual." p. 288

3. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989.

   "The life of an individual begins at conception, the fertilization of an ovum by a spermatozoon." p. 409

4. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989.

"Human development begins at fertilization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25

"The male and female pronuclei fuse and the maternal and paternal chromosomes intermingle. The new diploid cell is called a zygote. It is the primordium of a human being." pp. 25-26

"Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produces a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26

"Because half the chromosomes in the zygote come from the mother and the other half from the father, the zygote contains a new combination of chromosomes that differs from that of either of the parents. Consequently, fertilization forms the basis of biparental inheritance and ensures variation of the human species." p. 26

"The embryos chromosomal sex is determined at fertilization by the kind of sperm that fertilizes the ovum." p. 28

"Hence, it is the father rather than the mother whose gamete determines the sex of the embryo." p. 28

"Fertilization of the ovum by a sperm also initiates early human development by stimulating the zygote to undergo mitotic cell division or cleavage into two cells called blastomeres." p. 28

"Fertilization of the ovum usually occurs in the ampulla of the uterine tube. The process is complete when the haploid male and female pronuclei of the sperm and ovum, respectively, fuse to form a zygote. This diploid cell is the beginning of a new human being." p. 31

5. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988.

"The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410

"Genetically the zygote is complete. It represents a new single celled individual."

6. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987.

"Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertilization." p. __

7. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986.

"The development of a new human being begins when a male's sperm pierces the cell membrane of a female's ovum, or egg." p. 86

"The villi become the placenta, which will nourish the developing infant for the next eight and a half months." p. 86

8. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986.

"Human development begins at the moment of conception." p. 57

"Here, we will look at the process of fertilization that marks the beginning of the life cycle of a human being." p. 57

9. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986.

"Each individual begins life as a single cell that is formed by the union of two gametes - a sperm and an ovum (egg)." p. 50

"Characteristics are inherited according to specific laws, and the possibility of their occurrence in a new individual can be predicted." p. 58-59

10. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985.

"Development is a continuous process from conception (the fertilization of the ovum) to the death of the individual. For purposes of discussion, human development may be divided into two periods, prenatal development or embryology and postnatal development." p. 31

11. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985.

"Fertilization is the process whereby two sex cells (gametes) fuse together to create a new individual with genetic potentials derived from both parents." p. 32

12. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985.

"Each human begins life as a combination of two cells, a female ovum and a much smaller male sperm. This tiny unit, no bigger than a period on this page, contains all the

information needed to enable it to grow into the complex structure of the human body. The mother has only to provide nutrition and protection." p. 99

13. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985.

"... [T]here is absolutely no doubt at all that the story of the growth and development of a single being has its beginning at conception. This is the instant when a sperm from a human male enters and unites with an egg from a human female. The conceptual 'act of union' sets in motion a train of events of growth and development that only ends - perhaps more than a century later - when life itself ends." p. 9

"Fertilization brings together two sets of chromosomal material, one half the genetic blue print from the father, one half the genetic blueprint from the mother. Sperm and egg composition is so programmed that each sperm contains half the total gene complement of the father, each egg half that of the mother. This ensures that when egg and sperm fuse, a full complement of chromosomes exist in the newly fertilized egg. From this a new individual grows, ..." pp. 9-10

14. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985.

"You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environmental acts to shape the final product form the moment of conception onward."

15. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983.

"Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52

"Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52

"A zygote (a single fertilized egg cell) represents the onset of pregnancy and the genesis of a new life." p. 53

16. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983.

"Although the egg is many times greater in volume than the sperm, the two have equal potentialities as far as inheritance is concerned. The blueprints for traits are carried in the nucleus of each gamete (the mature sex cell - egg or sperm). The genetic characteristics of the future child are established at the time the sperm nucleus unites with the egg nucleus." p. 18

"The fertilized egg is genetically different from both parents, and one could contend that biological life commences at the moment of conception." p. 19

"The traits of an individual are largely determined by the genetic composition of the individual. A specific genetic code is locked into each cell of an individual of the very moment of the union of the sperm and egg nuclei." p. 20

17. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982.

"The sets of genes carried by offspring produced by sexual reproduction differ from each other and from the sets carried by either parent." p. 544.

"Within 12 hours after sperm penetration the nuclei of the sperm and the egg fuse together, restoring the appropriate number of chromosomes for body cells. All of the genes that will determine the characteristics of the offspring are now present in a single nucleus, and the sex of the offspring is established." p. 584

18. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982).

"I suggest that as physicians we should view human existence as a continuum from the first cell division of the fertilized ovum until the death of the last cell in the [human] organism." p. 564

19. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980.

"The newly formed cell (which is known as a zygote) represents the beginning of life."

20. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979.

"The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52

"Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its

own." pp. 52-53

"This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53

21. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979.

"The fertilized egg is smaller than a pinhead, but inside it, in the chromosomes, are all the instructions and information needed for a new human being to develop." p. 8

"The egg cell nucleus also releases its chromosomes, and both sets line up in the middle of the cell. This is the moment of fertilization, when a new life comes into being." p. 12 (emphasis added)

22. Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978.

"Life begins at the moment of conception - the time when a female reproductive cell, the ovum (plural, ova), is fertilized by a male reproductive cell, the spermatozoon (plural, spermatozoa)." p. 51

"The first important condition occurring at the time of conception, when the ovum is fertilized by the spermatozoon, is the determination of the newly created individual's hereditary endowment. When the sperm unites with the ovum, everything the newly conceived individual will ever inherit from parents, grandparents, and other more remote ancestors is set." p 53

"After conception, nothing can be done to add to, or subtract from, the individual's hereditary endowment." p 54

23. Strand, F.L. *Physiology: A Regulatory Systems Approach.* New York: Macmillan Publishing Company, Inc., 1978.
"The instant of fusion of the sperm nucleus with that of the ovum initiates a fascinatingly complex series of reactions which ultimately are designed to bring to full development an individual of the same species as the parents, bearing all the characteristics of his progenitors but individually different in a multitude of small ways. At this important instant, the genetic sex has also been determined." p. 542

"The cell has formed a new, mature individual, and we have come full cycle." p. 542

24. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child.* Homewood, IL: The Dorsey Press, 1977.

"In the normal human being, each cell is diploid, which means that it contains pairs of chromosomes - 23 pairs, or a total of 46 chromosomes." ... "Each parent contributes one half of the chromosomes complement to the new organism." p. 26

"During meiosis two phenomena occur which effectively guarantee that the new individual will be genetically unique. One of the phenomena, crossing-over, occurs when the chromosomes pair up. The other, segregation, occurs when the chromosomes begin to separate." p. 26

25. Pikunas, J. *Human Development: An Emergent Science.* McGraw-Hill, Inc., 1976.

"The union of ovum and sperm nuclei defines the hereditary endowment." p. 111

"The development of the child begins at conception, about nine months before birth." p. 111

26. Mader, S.S. *Inquiry into Life.* Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976.

"Each gamete, you'll recall, contains the haploid number of chromosomes, and the fertilized egg, or zygote, contains the diploid number of chromosomes as the new individual now begins development." p. 433 (emphasis added)

27. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976.

"A complete cell called a zygote with its normal complement of twenty-three pairs of chromosomes is formed and a new somatic cell series - thus a new individual - begins."

28. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975.
"Human life begins at Conception." p. 4

"Human life begins when one of many available sperm from a male succeeds in penetrating the wall of an ovum (egg) inside the female. The combination of material from the two parents, which determines what characteristics the new individual will inherit, begins a complicated sequence of development which will one day produce a mature human adult." p. 4

"Mendel assumed that a full set of genes comes from each parent as part of the fertilized egg (the zygote). This double set of genes is the genotype, the hereditary make up of the new individual." p. 42

29. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975.

"The life of a given individual begins when the sperm (male cell) penetrates the ovum (female cell)." p. 37

"Whatever biological potential is received from parents crosses this narrow hereditary bridge at the moment of conception." p. 40

30. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975.

"The sperm head then forms itself into a nucleus that approaches and eventually fuses with the nucleus of the ovum, producing, at that moment, a new single-celled individual or zygote. Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother." p. 500

31. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975.

"It is the resultant zygote that, by repeated mitotic cell divisions, will give rise to the adult of the next generation. This one of the most amazing facts of biology - that a single cell, by dividing and dividing and dividing again, can give rise to sometimes billions of cells of many different kinds and yet so precisely arranged that the resultant organism is not only a smoothly functioning individual but an individual of the same kind as the parent." p. 183

32. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974.

"The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximately 1/175 of an inch and its weight is about one 20-millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242

33. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974.

"In that fraction of a second when the chromosomes form pairs, the sex of the new child will be determined, hereditary characteristics received from each parent will be set, and a new life will have begun." pp. 28-29

34. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974.

"The zygote therefore contains a new arrangement of genes on the chromosomes never before duplicated in any other individual. The offspring destined to develop from the fertilized ovum will have a genetic constitution different from that of either parent and from anyone else in the world." p. 584

APPENDIX C

States Which Recognize That The Life Of A Human Being Begins At Conception

Alabama:

Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916) (interpreting state abortion law) ("'does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'") (quoting from the 1911 Transactions of the Medical Association of Alabama)

Wolfe v. Isbell, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973) (rejecting viability requirement in wrongful death action where death occurs after live birth):

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based upon viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.

Eich v. Town of Gulf Shores, 293 Ala. 95, 98-99, 300 So. 2d 354, 356-57 (1974) (rejecting live birth requirement in wrongful death action) (stating that "the paramount purpose of our wrongful death statutes . . . is the preservation of human life" and holding that "it is illogical to allow liability to depend on whether death from fatal injury occurred before or after live birth")

Alabama Constitutional Convention Call (S.J. Res. 9, 1980 Ala. Acts 396):

> [A]pplies to the Congress . . . to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution that would protect

> the lives of all human beings including unborn children at every stage of their biological development and providing that neither the United States nor any state shall deprive any human being, from the moment of fertilization, of the right to life without due process of laws, nor shall any state deny any human being, from the moment of fertilization, the equal protection of the laws, except where pregnancy results from rape or incest; or where abortion is necessary to save the life of the mother; or where testing revealed abnormality or deformity of the fetus.

Arizona:

Nelson v. Planned Parenthood Center of Tucson, 19 Ariz. App. 142, 505 P.2d 580, 586 (1973) (construing state abortion law):

> One cannot gainsay a legislative determination that an embryonic or fetal organism is 'life.' Once begun, the inevitable result is a human being, barring prior termination of the pregnancy.

Ariz. Rev. State., sec. 13-1103(A)(5) (West 1989) (defining offense of manslaughter to include "[k]nowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred")

Arkansas:

Ark. Const., Amend. 68, sec. 2 ("[t]he public policy of Arkansas is to protect the life of every unborn child from conception until birth, ...")

Arkansas Constitutional Convention Call (Res. of Feb. 17, 1977, H.R.J. Res. 2):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilizaton to be a person and entitled to the right of life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

California:

Cal. Pen. Code, sec. 187(a) (West 1988) ("[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought")

Cal. Civ. Code, sec. 29 (West 1982) ("[a] child conceived but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the even of its subsequent birth")

Scott v. McPheeters, 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (1939) (it is "an established and recognized fact by science and by everyone of understanding" that "an unborn child is a human being separate and distinct from its mother")

Connecticut:

Conn. Gen. Stat., Ann. sec. 53-31(a) (1985) ("[t]he public policy of the state and the intent of the legilatur is to protect and preserve human life from the moment of conception") (rep. by P.A. 90-113, sec. 4 (1990))

Simon v. Mullin, 34 Conn. Sup. 139, 147, 380 A.2d 1353, 1357 (1977) (rejecting viability requirement in wrongful death action where death occurs after live birth) ("[t]he development of the principle of law that now permits recovery by or on behalf of a chil dborn alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law")

Delaware:

Scott v. State, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955) (characterizing abortion law as one which defines an offense against the lives and persons of individuals)

Delaware Constitutional Convention Call (Res. of May 23, 1978), H.R. Con. Res. 9):

> Requests Congress to call a convention to propse a constitutional amendment that would protect the lives of all human beings, including unborn children at every stage of their biological development.

District of Columbia:

Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D. D.C. 1946) (recognizing cause of action for prenatal injuries) ("[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception--which it is in fact")

Greater Southeast Community Hosp. v. Wiliams, 482 A.2d 394, 396 (D.C. Ct. App. 1984) (rejecting viability requiremetn in wrongful death action where death occurs after live birth) (referring to "established medical fact that a fetus is a person

separate from its mother")

Florida:

Day v. Nationwide Mut. Ins. Co., 328 So.2d 560, 561 (1976) (rejecting viability requirement in case of prenatal injuries) (quoting with approval Prosser, Handbood of the Law of Torts, Sec. 55 at 336 (4th ed. 1971)):

> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending upon the health of the mother and child and many other matters in addition to the stage of development. Certainly, the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.[1]

Georgia:

Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956) (rejecting viability requirement in case of prenatal injuries) ("[i]f a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover") (one dissent characterized majority opinion as holding, in effect, "that an infant becomes a 'person' from the moment of conception, with the right to sue for a tortious injury after its birth"), id. at 506, 93 S.E.2d at 729.

[1] To which to the Fifth Edition of Prosser & Keaton (1984) adds: "With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether." Id. at 369.

Morrow v. Scott, 7 Ga. 535, 537 (1849) ("[i]n ... general, a child is to be considered as in being, from the time of its conception, where it will be for the benefit of such child to be so considered")

Gulf Life Ins. Co. v. Brown, 181 Ga. App. 72, 74, 351 S.E.2d 267, 269 (1986) ("unquestionably, Georgia cases show a clear tendency toward placing a high premium on human life and an unmistakable willingness to recognize a fetus as a person at a time prior to actual delivery")

Idaho:

Nash v. Meyer, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934) (construing state abortion law) (criminal abortion statute intended "to discourage abortions because thereby the life of a human being, the unborn child, is taken")

Blake v. Cruz, 108 Idaho 253, 261, 698 P.2d 315, 323 (1984) (Bistline, J., concurring in part and dissenting in part) ("[t]his Court recently committed itself to the proposition that an unborn child is a person in being," citing ~~Volk v. Baldazei~~, 103 Idaho 570, 651 P2d 11 (1982) (rejecting live birth requiremetn in wrongful death action where death occurs after viability))

Idaho Constitutional Convention Call (S. Con. Res. 132, 45th Legis. 2d Sess, 1980 Idaho Sess. Laws 1005):

> Request[]s that the Congress . . . call a constitutional convention for the specific and exclusive purpose of proposing an amendment . . . [to provide that]:
>
> (a) From the moment of conception a person shall be guaranteed all personal rights extended to all individuals under the constitution and laws of the United States of America and the state or states of residence and only under extreme circumstances shall it be otherwise, namesly to save the life of the mother, or other extenuating circumstances where at least two consulting physicians, one not having

> previously been involved in the case, and after due and thorough consultation with all persons having the legal right to be involved, find it is necessary and just that the life of the unborn shall be terminated.
>
> (b) Provide that the several states shall have the power to enforce such an amendment and establish priority of life by appropriate legislation.

Illinois:

Ill. Ann. Stat., ch. 38, par. 81-21 (Smith-Hurd 1977) (preamble to Illinois Abortion Act of 1975):

> [T]he General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the moment of conception and is, therefore, a legal person, for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State . . . .

Renslow v. Mennonite Hospital, 67 Ill.2d 348, 352-53, 367 N.E.2d 1250, 1252-53 (1977) (rejecting viability requirement in cause of action for prenatal injuries)

Ill. Rev. Stat., ch. 70, par. 2.2 (1991) (amending wrongful death statute to allow wrongful death action to be brought on behalf of an unborn child without regard to the stage of pregnancy when the child is injured or whether there is a live birth)

Ill. Rev. Stat., ch. 38, par. 9-1.2(b)(1) (1991) (defining "unborn child" as "any individual of the human species from fertilization until birth")

Ill. Rev. Stat., ch. 38, pars. 9-1.2, 9-2.1, 9-3.2, 12-3.2, 12-4.4 (1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Indiana:

Cheaney v. State, 259 Ind. 138, 145, 285 N.E.2d 265, 268 (1972) (construing state abortion law) ("[i]t is now established that some sort of independent life begins at conception," rejecting quickening and viability as outdated and arbitrary distinctions)

Cowe v. Forum Group, Inc., 541 N.E.2d 962, 967-68 (Ind. App. 1989), rev'd and remanded on other grounds, 575 N.E.2d 630 (Ind. 1991) (recognizing cause of action for prenatal injuries at any time after conception and rejecting viability requirement)

Kentucky:

Ky. Rev. Stat. Ann., sec. 311.710(5) (Michie/Bobbs-Merrill 1990):

> If . . . the United States constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.

Ky. Rev. Stat. Ann., sec. 311.720(5), (6) (abortion regulations) (defining "fetus" as "a human being from fertilization until birth" and "human being" as "any member of the species homo sapiens from fertilization until death")

Kentucky Constitutional Convention Call (H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401):

> [R]equest[s] Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution . . . :
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency,

including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Louisiana:

La. Stat. Ann., sec. 14.2(7) (West 1986) (defining "person" for purposes of criminal code to include "a human being from the moment of fertilization and implantation")

Danos v. St. Pierre, 383 So.2d 1019, 1027 (La. App.), aff'd, 402 So.2d 633 (La. 1991) (Lottinger, J., concurring):

> This definition [La. Stat. Ann., sec. 14.2(7) (West 1986)] added to the Criminal Code in 1976, reflects a legislative intent to classify an unborn child as a "person" for purposes of violent criminal conduct like homicide and battery. The definition reveals an express recognition by the legislature that life begins at the moment of conception and that this form of life can indeed be the victim of a harm, i.e., a murder or battery.

Sec. 1 of Acts 1991, No. 26 (amending state abortion law):

> It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

Johnson v. Southern New Orleans Light and Traction Co., Docket 9048 (La. App. Orl. Dec. 10, 1923) (rejecting live birth and viability requirements in cause of action for wrongful death) (quoted with approval in Danos v. St. Pierre, 402 So.2d 633, 639 (La. 1981)):

> The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe that the infant is a child from the moment of conception, although life may be in a state of suspended animation, the subject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.

Accord: *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951) (wrongful death of two to four month old unborn child).

Danos v. St. Pierre, 383 So.2d 1019, 1027 (La. App.), aff'd 402 So.2d 633 (La. 1991) (rejecting live birth requirement in action for wrongful death of a viable unborn child) (Lottinger, J., concurring):

> Viability has not been the controlling factor in some previous Louisiana cases allowing recovery [for wrongful death of a stillborn child], and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cut off point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable.

Louisiana Constitutional Convention Call (Res. of July 16, 1976, S. Con Res. 70):

> Requests Congress to call a convention to propose

> a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; requests state legislative bodies to apply to Congress to call a convention to propose this constitutional amendment; grants Congress and the states the power to enforce the amendment.

Maine:

Smith v. State, 33 Me. 48, 57 (1851) (construing criminal abortion statue which abolished the quickening distinction):

> There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

Maryland:

Damasiewicz v. Gorsuch, 197 Md. 417, 438, 79 A.2d 550, 559 (1951) (recognizing cause of action for prenatal injuries) ("from a medical point of view, a child is alive within the mother before the time arrives when it can live apart from her"), id. at 440, 79 A.2d at 560 (theory that "an unborn child is a part of the mother" is "an outworn point of view, now rejected by modern medicine")

Group Health Ass'n v. Blumenthal, 295 Md. 104, 119, 453 A.2d 1198, 1207 (1983) ("a cause of action lies for the wrongful death of a child born alive who dies as a result of injuries sustained

while en ventre sa mere") (rejecting viability requirement)

Massachusetts:

Commonwealth v. Cass, 392, Mass. 799, 801, 467 N.E. 2d 1324, 1325 (1984) (viable fetus is a "person" within meaning of vehicular homicide statute):

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in the normal course outside, the womb . . . By the use of the term[] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

Torigan v. Watertown News Co., Inc., 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967) (rejecting viability requirement in wrongful death action where death follows live birth)

Massachusetts Constitutional Convention Call (Act of June 8, 1977, H.R. 5984):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Michigan:

Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, xxx (1971) (recognizing cause of action for prenatal injuries

and rejecting viability requirement because "a child has a legal right to begin life with a sound mind and body")

O'Neil v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971) (recognizing cause of action for wrongful death of a viable stillborn child)

Minnesota:

Minn. Stat. Ann., secs. 609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (1987 & 1992 Supp.) (amending criminal code to include a broad range of crimes, including homicide, that can be committed against an unborn child, regardless of gestational age)

Verkennes v. Corniea, 229 Minn. 365, 369, 38 N.W.2d 838, 840 (1940) (rejecting live birth requirement in wrongful death action) (quoting with approval federal district court opinion in *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D. D.C. 1946), where court said "[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception--which it is in fact")

Missouri:

Mo. Ann. Stat. sec. 1.205.1(1) (Vernon Supp. 1992) (preamble to Missouri Abortion Law) ("[t]he life of each human being begins at conception")

Mo. Ann. Stat., sec. 188.015(6) (Vernon Supp. 1992) (abortion regulations) (defining "unborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development")

Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. 1972) (construing criminal abortion law) (accepting stipulation that "unborn children have all the qualities and attributes of adult human persons differing only in age or maturity" and that "[m]edically, life is a continuum from conception to death")

Steggall v. Morris, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953) (rejecting viability requirement in cause of action for prenatal injuries)

Missouri Constitutional Convention Call (Res. of Apr. 24, 1975, S. Con. Res. 7):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function, or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Montana:

Mont. Code Ann., sec. 50-20-102 (1991) (statement of legislative purpose and intent--abortion regulations):

> The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extent the protection of the laws of Montana in favor of all human life.

Mont. Code Ann., sec. 41-1-103 (1991) ("[a] child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth")

Nebraska:

Neb. Rev. Stat. sec. 28-325 (1989) (legislative findings in statutes regulating abortion) (legislators "deplore the destruction of the unborn human lives which has and will occur . . . as a consequence of the United States Supreme Court's decision," and lament their inability "to protect the life, health, and welfare of

pregnant women and unborn human life")

Hans v. State, 147 Neb. 67, 72, 22 N.W.2d 385, 389 on rehearing, 147 Neb. 73, 25 N.W.2d 35 (1946) (statute defining offense of "foeticide" meant "the unlawful destruction of an unborn child, in ventre sa mere, at any stage of gestation")

Nebraska Constitutional Convention Call (Res. of Apr. 21, 1978, Legis. Res. 152):

> Legislature . . . petition[s] . . . Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution of the United States . . .
>
> ARTICLE
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> Section 2. No unborn child shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Nevada:

White v. Yup, 85 Nev. 527, 536-37, 458 P.2d 617, 623 (1969) (recognizing cause of action for prenatal injuries and for the wrongful death of a viable, stillborn child) (proposition that "[a]n unborn child is a part of its mother until birth and thus has no juridical existence" "has no scientific or medical basis in fact")

Nevada Constitutional Convention Call (S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014):

> [L]egislature requests . . . Congress . . . to call a convention limited to proposing an amendment to the Constitution . . . to protect human life by restricting abortion [subject to exceptions in cases where the pregnancy results from rape or incest and where continuation of the pregnancy would seriously endanger the life of the mother].

New Hampshire:

Bennett v. Hymers, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958) (rejecting viability requirement in cause of action for prenatal injuries) ("[w]e adopt the opinion that the fetus from the time of conception become a separate organism and remains so throughout its life")

Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 136 (1980) (wrongful death action) ("[t]o deny a nonviable fetus a [wrongful death] cause of action is not to deny that life begins with conception")

N.H. Rev. Stat. Ann., secs. 631:1, 631:2 (1991 Supp.) (amending criminal assault statutes to include physical injuries to pregnant woman resulting in miscarriage or stillbirth)

New Jersey:

Smith v. Brennan, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960) (rejecting viability requirement in cause of action for prenatal injuries) ("[m]edical authorities have long recognized that

a child is in existence from the moment of conception, and not merely a part of its mother's body"):

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of independent existence. In the first place, age is not the sole measure of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application . . . In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of injury, the child sustains the same harm after birth, and therefore, should be given the same opportunity for redress.

Id. at 367, 157 A.2d at 504.

In *Smith v. Brennan*, the New Jersey Supreme Court quoted with approval Chief Justice Brogan's dissent in *Stemmer v. Kline*, 128 N.J.L. 455, 466, 26 A.2d 489, 687 (1942):

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed to-day that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be

> remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.

Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988) (granting to parents a common law cause of action where a physician negligently causes the pre-birth death of an infant)

State v. Gedicke, 43 N.J.L. 86, 89-90 (1881) (interpreting state abortion law) (state abortion law amended "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die")

New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

New York:

Kelly v. Gregory, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953) (rejecting viability requirement in cause of action for prenatal injuries) ("legal separability should begin where there is biological separability" and "separability begins at conception"):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than

> the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal.

Id. at 544, 125 N.Y.S.2d at 697.

North Carolina:

DiDonato v. Wortman, 320 N.C. 423, 435, 358 S.E.2d 489, 496 (1987) (recognizing cause of action for wrongful death of a viable unborn child) ("[t]he public policy of this state as expressed by the legislature in our statutes recognizes that an unborn child is a person") (Martin, J., concurring in part and dissenting in part)

Corkey v. Edwards, 322 F. Supp. 1248, 1252 (W.D.N.C. 1971), vacated and remanded (construing criminal abortion statute):

> Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

North Dakota:

N.D. Cen. Code, secs. 12.7-17.1-02 through 12.1-17.1-06 (Supp. 1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Hopkins v. McBane, 359 N.W.2d 862, 865 (rejecting viability requirement in cause of action for prenatal injuries and live

birth requirement in wrongful death actions) ("it is commonly understood that an unborn child is a human being or person which has life and which, even prior to the process of birth, can experience death")

statute providing that "[a] child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth" was intended "to ensure and to protect the interests of a child subsequent to its conception but prior to its birth"), id. 359 N.W. 2d at 864

Ohio:

Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law) (holding that human life is entitled to federal constitutional protection from conception) ("a new life comes into being with the union of human egg and sperm cells" and "such terms as 'quick' or 'viable', which are frequently encountered in legal discussion, are scientifically imprecise and without recognized meaning")

Williams v. Marion Rapid Transmit, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949) (recognizing cause of action for prenatal injuries):

> To hold that the plaintiff in this case [a viable unborn child] did not suffer an injury in her person would require this court to announce that as a matter of law the infant is part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right [to a remedy] conferred by the [Ohio] Constitution upon all persons, by the application of a time worn fiction not founded on fact and within common knowledge untrue and unjustified.

The court also quoted with approval Prosser on Torts (3d ed.) wherein Professor Prosser stated, "So far as duty is concerned, if existence at the time [of injury] is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and that for many purposes its

existence is recognized by the law." Id. at 127, 39 Ohio Ops. at 439, 87 N.E.2d at 339.

Oklahoma:

Okla. Stat. Ann., tit. 63, sec. 1-730(2) (1984) (abortion regulations) (defining "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth . . . ")

Evans v. Olson, 550 P.2d 924, 925 (1976) (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions) ("there is no medical or scientific basis" for the proposition that "[a]n unborn child has no juridical existence apart from its mother")

Oregon:

State v. Ausplun, 86 Or. 121, 131-132, 167 P. 1019, 1022-23 (1917) (construing criminal abortion law):

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.

Mallison v. Pomeroy, 205 Or. 690, 696-97, 291 P.2d 225, 228 (1955) (recognizing cause of action for prenatal injuries) ("[i]n Oregon we have recognized by statute the separate entity of an

unborn child by protecting him in his property rights and against criminal conduct, and we can see no logical reason why a viable child should not be protected for injuries sustained through the tortious acts of another")

Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636, 520 P.2d 361 (1974) (recognizing cause of action for the wrongful death of a viable stillborn child)

Pennsylvania:

Pa. Cons. Stat. Ann., tit. 18, sec. 3203 (Purdon's 1992 Supp.) (abortion regulations) (defining "unborn child" and "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth")

Amadio v. Levin, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985) (rejecting both viability and live birth requirements in wrongful death actions) ("a child en ventre sa mere is a separate individual from the moment of conception")

Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (rejecting viability requirement in cause of action for prenatal injuries) (viability "has little to do with the basis right to recover, when the foetus is regarded as having existence as a separate creature form the moment of conception")

Pennsylvania Constitutional Convention Call (H.R. 71, 1978 Gen. Assembly, 1978 Pa. Laws 1431):

> [A]pplication to the Congress . . . to call a convention for drafting and proposing an amendment to the Constitution . . . to guarantee the right to life to the unborn fetus by doing the following:
>
> (a) With respect to the right to life guaranteed in the United States Constitution, provide that every human being subject o the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a

person and entitled to the right to life.

(b) Provide that Congress and the several states shall have concurrent powers to enforce such an amendment by appropriate legislation.

* * *

(d) Nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Rhode Island:

R.I. Gen. Laws, sec. 11-3-4 (1981) (1973 R.I. Pub. Laws 68-70, ch. 15, sec. 2) (criminal abortion statute):

> It shall be conclusively presumed in any action concerning the construction, application or validity or sec. 11-3-1 [prohibiting abortion] that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the Constitution . . .

Sylvia v. Gobeille, 101 R.I. 76, 79, 220 A.2d 222, 223-24 (1966) (rejecting viability requirement in cause of action for prenatal injuries) (noting "the medical fact that a fetus becomes a living human being from the moment of conception" and rejecting viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence")

Presley v. Newport Hospital, 117 R.I. 177, 183, 365 A.2d 748, 751 (1976) (rejecting live birth requirement in wrongful death of a viable unborn child) (citing with approval the civil law proposition that "from the moment of conception a separate organism comes into existence" and the medical proposition that "an ovum, once it is fertilized, is a separate living entity"):

> [V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. If it seems that if live birth is to be characterized, as is so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable non sequitur.

Id. at 188, 365 A.2d at 753-54 (dicta in plurality opinion).

Rhode Island Constitutional Convention Call (Act of Apr. 21, 1977, H.R. 5150):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent power to enforce such an amendment.

South Dakota:

State v. Munson, 86 S.D. 663, 669, 201 N.W.2d 123, 126 (1972), vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law) (citing with approval holding in *Steinberg v. Brown*, 321 F. Supp. 7431 (D. Ohio 1970), that human life is entitled to federal constitutional protection from conception)

S.D. Codified Laws Ann., sec. 21-5-1 (1987) (amending wrongful death statute to include "an unborn child" without regard to gestational age)

S.D. Codified Laws Ann., sec. 22-17-6 (1988) ("[a]ny person who intentionally kills a human fetus by causing an injury

to its mother is guilty of a Class 4 felony")

S.D. Codified Laws Ann., sec. 26-1-2 (1992) ("[a] child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth")

Texas:

Thompson v. State, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law):

> The State of Texas is committed to preserving the lives of its citizens so that no citizen "shall be deprived of life . . . except by the due course of the law of the land." [Citation omitted]. [The Texas abortion law] is designed to protect fetal life . . . and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.

Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth), rev'g 413 S.W.2d 825 (Tex. Civ. App. 1967) (denying cause of action) and app'g dissenting opinion of Justice Cadena, 413 S.W. 2d at 828 ("medical science . . . consider[s] that life begins at conception"), id. at 829 ("legalistic concept that the unborn child is but a part of its mother" is "contrary to scientific fact and comon sense")

Witty v. Am. Gen. Capital Dist., Inc., 727 S.W.2d 503, 505 (Tex. 1987) (denying cause of action for wrongful death of viable child who was stillborn but recognizing "the fetus as having an existence separate from its mother")

Yandell v. Delgago, 468 S.W.2d 475 (Tex. Civ. App. 1971) (rejecting viability requirement in cause of action for prenatal injuries), writ ref'd n.r.e. per curiam, 471 S.W.2d 569 (Tex. 1971)

Utah:

Utah Code Ann., sec. 76-7-301.1(1) (1992) (preamble to Utah abortion law):

> It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Section 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

Sec. 76-7-301.1(2):

> The state of Utah has a compelling interest in the protection of the lives of its unborn children.

Sec. 76070301.1(3):

> It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.

Utah Code Ann., sec. 76-5-201(1) (1992 Supp.) (defining offense of criminal homicide as causing "the death of another human being, including an unborn child")

Utah Constitutional Convention Call (H.R.J. Res. 28, 42nd Legis., Reg. Sess., 1977 utah Laws 1317, 1318):

> Requests Congress to call a convention for the purpose of drafting and submitting for ratification by the states, an amendment to the Constitution that will guarantee to every human life, from the moment of fertilization throughout its natural existence, in every state, territory, and possession of the United States, the full protection of all laws respecting life,

> expecting an unborn child whose mother's life would otherwise be lost.

Virginia:

Kalafult v. Gruver, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth) (noting "developments in medical science, especially in the field of embryology," court held that "an action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established")

Wisconsin:

Wis. Stat. Ann., sec, 940.04(6) (West 1982) (criminal abortion statute defining "unborn child" as "a human being from the time of conception until it is born alive")

Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 356, 99 N.W.2d 163, 170 (1959) (rejecting viability requirement in cause of action for prenatal injuries):

> The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and non-viability and fails to recognize the biological fact that there is a living human being before viability. A child is no more a part of its mother before it becomes viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.

Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis.2d 14, 21, 148 N.W.2d 107, 111 (1966) (rejecting born alive requirement in wrongful death actions) (assertion that "[a] child has not juridical existence apart from its mother" has "no scientific or medical basis in fact")

APPENDIX D

18th Century British Common Law Which Considered The Child as a Person Before Birth

The 18th Century British Common Law, both the courts of law and of equity, held the child *en ventre sa mere* to be a person. A review of the case law demonstrates that in 18th Century Britain: (a) the courts reasoned from the fact that such child is a person, as it is *en ventre sa mere*, to the application of law and equity to that child; (b) the Equity courts, in this instance, learnt their equity (i.e. what was natural justice) as much from principles of law as from its own rulings; (c) courts sitting in civil cases learnt from the principles of criminal law recognizing the child before birth; and (d) the live birth of the child served to provide proof of what was the case during his or gestation - i.e. that the child was a person in existence at the relevant time during gestation, the gender of the child if pertinent, and that the child was indeed alive in utero at the time when the injuries, observable at birth and of what the child then died, were inflicted by the accused charged with the child's murder.

In *Beale v. Beale*, (1713) 1 P. Wms. 244 (24 ER 373) (England), Harcourt LC reasoned from the regard for the child *en*

ventre sa mere at law (i.e. before the courts of law as distinct to equity) to what a court of equity should do:

> As to the other objection, it would be very hard in a court of equity, that a child, because it happened not to be born at such a time, must, therefore, be unprovided for, but as the law in many respects, regards an infant in *ventre sa mere*, so as to allow such child to be vouched (1 Inst. 390); also as the mother may be guilty of the murder of the child in *ventre sa mere*, if she takes poison with an intent to poison it, and the child is born alive, and afterwards dies of that poison (3 Inst. 50, 51): so there is more reason that equity should consider such child, in order to its being *provided for*; and therefore this posthumous child may be well looked upon, in equity, to be *living at her father's death* in *ventre sa mere*. (at 246, underling added)

In *Burdet v. Hopegood*, 1718 1 P. Wms. 486 (24 ER 484) (England), where a testator died leaving his wife *ensient* with a son, the plaintiff Sir Robert Burdet, it was nevertheless objected that "the testator had died leaving a son at the time of his death". The report records:

> Hereupon Lord Chancellor *Parker* referred [the question] to the judges of the King's Bench, who were unanimously of opinion, that the plaintiff Sir *Robert* though not born, had yet an existence in the eye of the law, as in *ventre sa mere*, which in many respects was regarded: as if a woman takes poison to kill her child then in her womb, and the child is born alive, and afterwards dies of that poison, the woman is guilty of murder (vide *Beale v. Beale*, ante, 244); also a child in *ventre sa mere* may be vouched, and may be a devisee, and it would be

> hard to disinherit such an only child, nor could it be imagined the testator ever intended to so to do. (underlining added)

With this the Lord Chancellor agreed, and gave judgment for the plaintiff. To meet the objection, the judges of the King's Bench reasoned from the fact that the plaintiff was in existence when a child *en ventre sa mere*, as recognised by the courts of law, of which they gave a number of instances, notably, the criminal law: they concluded that the testator's intention embraced this son in existence at his death. It was only the *proof* of this which was briefly delayed. No fiction or straining of language was involved in arriving at the result.

In *Thellusson v. Woodford* (1805) 11 Ves. Jun. 112 (32 ER 1030) (England), the House of Lords was asked on appeal to determine the following objection, as to why the testator's Will was said to infringe the rule against perpetuities:

> The second objection, which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease those of persons not then born. (at 138; 1040)

This related to twin grandsons of the testator *en ventre* at his death: they were defendants in the action (4 Ves. 237; ER 122) (England). It was to their detriment if they were held to be

persons in being at the testator's death, because if they were not they could eventually be entitled to the accumulated property, applying the doctrine of *Cy pres* (as noted in argument, 4 Ves. 298; ER 152) (England).

Lord Chief Baron Macdonald, delivering the unanimous opinion of the Judges, first held that by the words "born in due time afterwards" the testator was referring to the period of gestation, and mean, "...such children of the several persons named as their respective mothers were *ensient* with at the time of his death" (at 138-139; 1041). Then, in dismissing this as a ground of objection to the Will, he applied a number of cases recognizing the existence of the child *en ventre sa mere* (at 139; 1041): in particular, the *Beale* and *Burdet* cases noted above, and also the following cases recognising that the child *en ventre sa mere* is a person in reality, to all intents and purposes - -

> In *Wallis v. Hodgson* [sic] (2 Atk. 117) (England) Lord Hardwicke held, that a posthumous child was entitled under the Statute of Distributions; and his reason deserves notice. 'The principal reason (says he) that I go upon, is, that the Plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum nutura* [sic, *natura*]; so that by the rules of the Common and Civil Law she was, to all intents and purposes, a child, as much as if born in the father's lifetime," ...In *Doe v. Lancashire* (5 Term Rep. 49) (England),

> the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a Will, in like manner as if the child had been born in the life-time of the father. In *Doe v. Clarke* (2 H. Black. 399) (England) Lord Chief Justice Eyre holds, that independent of intention an infant *en ventre sa mere* by the course and order of nature is then living; and comes clearly within the description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happen to be actually born at the time of his death. The most recent case is that of *Long v. Blackall* (3 Ves. 486; 7 Term Rep. 100) (England). There the Court of King's Bench had no doubt, that a devise to a child *en ventre sa mere* in the first instance was good, and a limitation over was good also, ... (at 139-141; 1041, underlining added).

Because the child *en ventre sa mere* is a person in being, Lord Chief Baron Macdonald held that such child was a life that could postpone vesting (at 141; 1042), and that at the time of the vesting of the estate at the end of the period of accumulation, a child *en ventre sa mere* is entitled to take (142ff; 1042).

Lord Hardwicke supported his ruling in *Wallis v. Hodson* (1740) 2 Atk. 114 (26 ER 472) (England), noted above, by listing principles of the Common Law showing regard for children *en ventre sa mere* as persons in divers instances:

> First, as to the common law, there is the trite case of an infant *en ventre sa mere* being vouched in a

> common recovery; a mother also may justify the detaining of charters on behalf of it; a devise to him is good, by the opinion of *Treby* and *Powell*, in *Scatterwood* and *Edge*, 1 *Salk*. 229, a bill may be brought in his behalf, and this court will grant an injunction in his favor to stay waste, 2 *Vern*. 710, *Musgrave versus Parry*, et al. (at 117; 473)

At first instance in *Thellusson v. Woodford* (1798) 4 Ves. Jun. 227 (31 ER 117) (England), it is similarly objected: "That a devise for the life of a child *en ventre sa mere* is void" (at 320; 162). In answer to this, Buller J applied the same passage from Lord *Hardwicke* in *Wallis v. Hodson* on which the House of Lords also relied, and then continued:

> In the same case [*Wallis v. Hodson*] Lord *Hardwicke* takes notice, that the Civil Law confines the rule to cases, where it is for the benefit of the child to be considered as born: <u>but notwithstanding he states the rule to be, that such is to be considered living to all intents and purposes</u>.
>
> ...
>
> ... In *Doe v. Clarke*, the words 'that wherever such consideration would be for his benefit, a child *en ventre* sa mere shall be considered as absolutely born' were used by me, because I found them in the Book, from whence the passage was taken. But there is no reason for so confining the rule. <u>Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons</u>. In this case it is enough to say, such a child is capable of having an estate given to him, and consequently to another person for his life. The infant is not hurt, nor is the

> Law transgressed, by giving the interest to a third person any more than by giving it to the infant himself.
>
> ...
>
> *Goodtitle v. Wood* (7 Term Rep. B.R. 103, note) (England) is an authority to the same point. The effect is, that there is no difference between a child actually born and a child *en ventre sa mere*. In *Lancashire v. Lancashire* Judge Grose says, 'I know of no argument founded on law and natural justice, in favor of the child, who is born during his father's life, that does not equally extend to a posthumous child, ... " (at 322-324; 163-164, underling added)

Her Majesty's Attorney-General, a respondent, was of like mind: he submitted to the House of Lords, "The whole foundation for the argument, that such children are to be considered as in being for their own benefit only, rests upon some words which some Reporters of Decisions have ascribed to Judges, when delivering their opinions upon claims made by such children. But these words, if they were used in those cases, by no means negative the proposition, that such children are in being for all purposes. There is no reason for confining the rule. They are entitled to the privileges of all persons; and it is reasonable, that they should be the means of conferring privileges upon other persons. But the law considers such children as being in cases, in which they may be prejudiced. They may be vouched in a

recovery (Co. Lit. 390a); though such voucher is for the purpose of making them answerable over in value. They may be executors." (11 Ves. Jun. 112, 129-130; 1037).

In the result, determining the case "according to the rules of Law and Equity", Lord Eldon (HL) affirmed the judgment at first instance. (150-151; 1045).

That Chancery and the King's Bench were *ad idem* that an infant *en ventre sa mere* was a life in being, as apparent from the references in the case to the history of *Long v. Blackall* before those two Courts. (4 Ves. 227, 341-343; 11 Ves. 112, 150) That the Court of Common Pleas was of the same mind, appears from the ruling of Eyre LCJ in *Doe v. Clarke* (1795) 2 H.Bl. 399 (126 ER 617) (England) noted by the House of Lords (see quotation above).

The reasoning in the several quotations set out above grounded the property rights of a child *en ventre sa mere* in his reality as a person in being. Even more so should the child's existence justify his or her life being protected by others, before and after birth, giving rise to a defence in a criminal case. In fact, as *Beale v. Beale* (1713) and *Burdet v. Hopegood* (1718) show, it was apparent to the court from the criminal law that the child *en* ventre sa mere is a living person. It is equally apparent, too, from

the fact that such child has a right not to be injured, for there is a duty of care to him or her: *Watt v. Rams* [1972] VR 353 (England); *Lynch v. Lynch* [1991] Aust Tors Reports ¶81-117 (SCt), affirmed (1991) 25 NSWLR 411 (CA) (England). Intentionally injury would be a trespass. [If the child cannot sue until birth, that appears to be a procedural bar: *Watt*, 376 lines 1-6; *Lynch* (SCt), page 69,096 (2nd para.)]

The rule in *Burdet v. Hopegood* and other cases said Loughborough LC in *Thellusson v. Woodford* (1798) 4 Ves. Jun. 227-342 (England), "is according to every principle of justice and natural feeling." These same principles equally justify the application of the justification of defence of others in respect to infants *en ventre sa mere*.

Two later House of Lords cases do not affect the result in *Thellusson* or its reasoning from the substantive fact that the child *ensient* is a person in being, nor the substantive principles of law or equity relating to the child *en ventre sa mere* cited in that case:

(1) *Villar v. Gilbey* [1907] AC 139 (HL) (England) re-asserted as a rule of construction that the word "born" is construed to include an unborn child only where that construction is necessary for its benefit. Counsel for the appellant expressly

noted, "It is necessary to distinguish between cases of construction proper and cases in which a principle of law is involved." (at 139-140) Lord Loreburn LC noted (at 144) some of the principles of substantive law relating to the child *en ventre sa mere*, such as the law's solicitude for the child and that it can be a party to proceedings (which Lord Hardwicke noted in *Wallis v. Hodson*), before he turned to the matter of construction in that case. At 149, Lord Atkinson briefly distinguished *Thellusson* as relating to the rule against perpetuities, but did not disturb its substantive reasoning or the result.

(2) *Elliot v. Lord Joicy* [1935] AC 209 HL (England) also involved a question of construction relating to a posthumous child (he was held not to come within the intention of the testatrix as appearing from her Will). *Thellusson* was again distinguished as relating to perpetuity only and having "nothing to do with any question of construction analogous to the question now in issue" (at 220 middle); a dictum of Lord Eldon relating to construction was qualified in its effect so that the rule of construction for the benefit of posthumous child did not apply where the benefit were only of an indirect kind (at 228-229, read with 220-221). Lord MacMillan, after noting that English and Scots law on the question

of interpretation where a posthumous child is concerned was the same (at 236-237), accepted the following learned statement of Scots law as accurate:

> the doctrine of the Civil Law which has long been received into our system of jurisprudence, that a child born after the period at which the vesting of a right falls to be determined, but proved by the period to its birth to have been in utero at that time, is entitled to the rights of an existing period from the period of its conception. ... (239, underlining added)

In other words birth serves, not to change the child's status from non-entity to person, but as *proof* of the child's existence in utero, with the entitlement to "the rights of an existing person from the period of its conception." CF. In re *Wilmer's Trusts* [1903] 1 Ch. 874, 880-883; [1903] 2 Ch. 411 (CA), 417-421, (England) where what became known at birth was "related back" as proof of that being the fact also during gestation: the child *ensient* at the testatrix's death turned out to be a son when born - "here we must treat it as the actual fact that there was a third son in existence prior to the death of the testatrix" (at 421, CA). He was thus a relevant life for the rule against perpetuities - in *Thellusson* the gender of the twins *ensient* at the testator's death was immaterial.

In *Thellusson*, the court reasoned from the fact that the child *ensient* is a person in existence to establish that the principles of law relating to perpetuities were not offended by holding such child to be a life in being at the testator's death. Because *Thellusson* involved a principle of law, it went further than the rule of construction involved in the *Villar* and *Elliot* cases: its recognition of the child during gestation was "to all intents and purposes", in fact it was to the prejudice of the twins in that case. [Likewise, *In re Wilmer's Trusts* [1903] 2 Ch. 411 (CA) (England), 421, per Romer LJ] That there are other principles of law which also apply to a child *ensient* for his or her benefit or prejudice, indeed, rights or liabilities, was noted in the quotations from *Thellusson* and the earlier cases given above.

In a recent Scotish case, *McWilliams v. Lord Fraser of Carmyllie* (28 July 1992) (England), Lord Morton of Shuna refused to apply *Elliot v. Lord Joicey* to a negligence claim where the parents were suing for damages for the death of their child who was injured in utero then born alive and died.

The defender had conceded that during the period Martin was alive there was, assuming fault, a liability to pay damages to Martin for his pre-natal injuries, but this concession was limited to

the child's right of action being dependent on the legal fiction that, "in all matters affecting its interests, the unborn child in utero should be deemed to be already born", described by Lord MacMillan in *Elliot v Joicey* (at 238). The defender limited his concession to that fiction because, in applying this rule of construction in that case, Lord MacMillan said that "According to the law of Scotland, a child in utero is fictionally deemed to be already born only when the result of applying the fiction is to benefit the child when actually born, and that the fiction cannot be invoked in the interests of any third party." The defender argued that, for this reason, the parents as third parties had no claim. (pp. 3-4)

Lord Morton rejected this reliance on *Elliot* because he accepted the view of the Scottish Law Commission that there was a duty of care to a child in the womb (p.6), and that a child born alive with injuries could recover under the principles of negligence (pp.6-10): he held that this is "the law of Scotland both before and after the passage of the Damages (Scotland) Act" (p.10). Returning to the legal fiction referred to by Lord McMillan in *Elliot v. Joicey*, he considered some case law and concluded:

For these reasons I consider that it is not necessary

> to rely on the 'legal fiction' to give a child who is born alive a title to sue for injuries sustained in utero and that if a child dies after being born alive and the death is cause by injuries sustained in utero the parents of that child have a title to sue for damages for the death of that child. I shall accordingly repel the defender's plea to the relevancy [of the claim]. - (p.13)

Lord Morton was right in principle to refuse to allow the rule of construction in *Elliot* to excuse a defendant where liability turned, not on any legal fiction, but on substantive issues such as the duty of care towards another.

APPENDIX E.

QUOTATIONS CONCERNING THE CLASS OF HUMAN BEINGS WHO POSSESS NATURAL AND INALIENABLE RIGHTS TO LIFE

1. In a speech reflecting upon the Fred Scott decision in Springfield, Illinois on June 26, 1857, Abraham Lincoln, in criticizing Chief Justice Roger Taney's acknowledgement that the Declaration of Independence was broad enough to include "the whole human family," but failed to implement the principles therein encompassed, explained the principle J.M. exposes:

   "They (the founding fathers) meant simply to declare the right (to life, liberty and happiness) so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard for free society, which should be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and the happiness and value of life to all people of all colors everywhere. The assertion that 'all mean are created equal...' was placed in the Declaration, not for [separation from Britain], but for future use." Lincoln on Democracy, "A Standard Maximum for Free Society," (June 16, 1857), p. 90, 91

2. Compare what Lincoln says here about slavery to the "present controversy":

   "All these free blacks are the descendants of slaves, or have been slaves themselves, and they would be slaves now, but for something which has operated on their white owners, inducing them, at vast pecuniary sacrifices, to liberate them. What is this something? Is there any mistaking it? In all these cases it is your sense of justice, and human sympathy, continually telling you, that the poor

negro has some natural right to himself -- that those who deny it, and make mere merchandise of him, deserve kicking, contempt and death." Abraham Lincoln, Peoria Speech, 1854.

3. At Galesburg, the other day, I said, in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term 'all men'. I reassert it today. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a great matter of astonishment to men if they shall be able to find that one human being three years ago had every uttered the astounding sentiment that the term 'all men' in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, denied the truth of it. I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouth of some Southern men for a period years, ending at last in that shameful, though rather forcible, declaration of Petit of Indiana, upon the floor of the United States Senate, that the Declaration of Independence was in that respect a 'self-evident lie', rather than a self-evident truth. But I say... that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it, and then asserting it did not include the negro..." Lincoln, Lincoln's speech at Alton, during the Lincoln-Douglas debates.

4. Chief Justice Taney and Judge Stephen Douglas assert that the authors of the Declaration of Independence did not intend to include negroes. In this assertion, they do 'obvious violence to the plain, unmistakable language of the Declaration. I think the authors of that notable instrument intended too include all mean, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size intellect, moral

developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal -- equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this they meant....They meant to set upa standard maxim for a free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.' Lincoln, Speech of the Dread Scott decision, 1857.

5. 'Let us discard all this quibbling about this man the other man, this race and that race and the other race being inferior, and therefore must be placed in an inferior position. Let us discard all these things, until we shall once more stand up declaring that all men are created equal.' Lincoln, Chicago Speech, July 10, 1858.

6. "I trust I understand, and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all which is exclusively his own, lies at the foundation of the sense of justice there is in me .... The doctrine of self-government is right -- absolutely and eternally right -- but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is <u>not</u> or <u>is</u> a man. If he is <u>not</u> a man, why in that case, he who <u>is</u> a man may, as a matter of self-government, do just as he pleases with him. But if the negro <u>is</u> a man, is it not to that extend, a total destruction of self-government, to say that he too shall not govern <u>himself</u>? When the white man governs himself that is self-government; but when he governs himself, and also governs <u>another</u> man, that is <u>more</u> than self-government -- that is despotism. If the negro <u>is</u> a man, why then my ancient faith teaches me that 'all men are created equal'; and that there can be no moral right in connection with one man's making a slave of another." Lincoln, Speech on the Kansas-Nebraska Act, 1854.

7. 'It was impossible to raise the question of the status of the humanity of the Negro, without at the same time raising an equally vital question concerning the status of the humanity of white men. It was impossible to deny the Negro the natural rights demanded for all men by the Declaration of Independence without denying the natural foundation of the rights of white men. And it was impossible to change radically the way of conceiving of the white man's rights without changing radically the white man's life. Even if the legal foundation of American rights had remained the same -- which Lincoln believed impossible -- the changed conception of their extra-legal foundation in 'the laws of Nature and of Nature's God' would have been catastrophic to him. It would have been a change in the inner consciousness of the American citizen which would have sapped his moral dignity and have deprived him of his inner worth ...'

Harry V. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates (Chicago: The University of Chicago Press, 1959), 303.

APPENDIX F.

List of Quotations from Founders of the United States and Framers of the Constitution which Evidence the Principle that the Right to Life As a Natural and Inalienable Right Is Beyond the Power of Government to Withhold from any Class of Human Beings.

1. James Wilson

In this constitution (1789) all authority is derived from the people ... when a single government is instituted, the individuals of which it is composed surrender to it a part of their natural independence, which they before enjoyed as men. The Works of James Wilson, ed by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II, James Wilson, Speech in Convention, November 16, 1987 p. 539, 545.

2. John Adams

Rights antecedent to all earthly government - Rights that cannot be repealed or restrained by human laws - Rights derived from the great Legislator of the universe. ... British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts ... coeval with government. ... Many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed. 3 Adams, Life and Works 448-64, at 449, 463.

3. John Adams

Whether we should recur to the law of nature, as well as to the British constitution, and our American charters and grants. Mr. Galloway and Mr. Duane were for excluding the law of nature. I was strenuous for retaining and insisting on it, as a recourse to which we might be driven by Parliament much sooner than we were aware. Adams,

Life and Works 374.

4. Alexander Hamilton

The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam in the whole volume of human nature, by the hand of the divinity itself, and can never be erased or obscured by mortal power. Alexander Hamilton, "The Farmer Refuted." This can be found in Morton J. Frisch, ed., Selected Writings and Speeches of Alexander Hamilton (Washington: American Enterprise Institute for Public Policy Research, 1985), 21.

5. Alexander Hamilton

The law of nature [is] '... coeval with mankind, and dictated by God himself, [and] is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, at all times. No human laws are of any validity, if contrary to this ...' Alexander Hamilton, ibid., 20. (quoting Blackstone's Commentaries)

6. Alexander Hamilton

In short, when human laws contradict or discountenance the means, which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws, and so become null and void. Alexander Hamilton, ibid., 22.

7. John Dickinson

...[A] constitution is the organization of the contributed rights in society. Government is the exercise of them. It is intended for the benefit of the governed, of course [it] can have no just powers but what conduce to that end: and the awfulness of the trust is demonstrated in this -- that it is founded on the nature of man, that is, on the will of his Maker, and is therefore sacred. Fabius (John Dickinson of Pennsylvania), Letter IV.

8. Tench Coxe

This is a most enlightened time, but more especially so in regard to matters of government. The divine right of kings, the force of ecclesiastical obligations in civil affairs, and many other gross errors, under which our forefathers have lain in darker ages of the world, are now done away. The natural, indefeasible and unalienable rights of mankind form the more eligible ground on which we now stand ... On this solid basis is reared the fabric of our new federal government. These taken together form THE GREAT AND WHOLE OF THE AMERICAN CONSTITUTIONS, the fairest fabric of liberty that every blessed mankind, immovably founded on a solid rock, whose mighty base is laid at the center o the earth." Essay by a democratic Federalist (likely Tench Coxe), printed in the Philadelphia Independent Gazetteer, 26 November 1787.

9. James Madison

Let us recur 'to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed.' James Madison, Federalist No. 43.

10. James Madison

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe ... If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights ... Either then, we must say, that the will of the legislature is the only measure of their [the people's] authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave ... [natural] right untouched and sacred ..." James Madison, "memorial and

Remonstrance," 1785. This can be located in Marvin Meyers, ed., The Mind of the Founder: Sources of the Political Thought of James Madison (Hanover: University press of New England, 973), 6-13.

11. Thomas Jefferson

'And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that His justice cannot sleep forever ...' Thomas Jefferson, Notes on Virginia, Query XVIII. In this passage Jefferson is speaking about the God-given, natural and inalienable rights of all human beings and referring specifically to the fact that one of these rights -- the right to liberty -- has been denied to some human beings, i.e., to "slaves."

Numerous commentaries express this view of the constitution framers' understanding of natural and inalienable rights.

1. The Declaration of Independence appeals to the "laws of nature and of nature's God "to justify the United States' break with Britain and to declare to a candid world the basis of the political order that will take its place. The purpose and limits of political life are determined by the rule of a higher law in the divine and natural order. It could be said that God and nature, in the founders' understanding, are man's supreme legislature. This natural standard of right, which transcends all human laws and constitutions, directs politics in two ways. First, it shows politics its proper end, namely the safety and happiness of the people. ... Law is called a rule, in order to distinguish it from a sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law. In this way James Wilson, who along with Hamilton and Madison was the most thoughtful of the Constitution's framers, distinguished a law from an ad hoc decision made regarding a particular case. ... The rule of law, in sum, is a

governmental practice designed to make as likely as possible the coincidence of the two requirements of just government: that it be by the consent of the people and that it secure the safety and happiness of society.

Saving the Revolution: The Federalist Papers and the American Family, Ed. by Charles R. Kesler, The Free Press, N.Y. (1987)

2. Yet the human nature that modern constitutions channel cannot be considered mere matter. Human beings are not a formless sea of humanity; they are not body but bodies, and each body has a form and an end that, though common to other bodies, distinguish it from other bodies: the self and its preservation. men are not unformed; the form is given by nature - in the state of nature, according to Locke. This form is arranged and managed in the constitution of civil society, but is not itself changed by the constitution maker. ... Civil constitutions exist to serve and protect the form and end that men have in the state of nature, the rights of *man*, not of citizens. America's Constitutiona Soul, Harvey C. Mansfield, J.r, John Hopkins Univ. Press, Brittain (1991).

3. (a) There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration. ...

(b) Thus the legality of the Constitution, its supremacy, and its claim to be worshipped, alike find common standing

ground on the belief in a law superior to the will of human governors. ...

(c) That is to say the essential ingredient of the justice which is enforced by the state is not of the state's own contrivance; it is a discovery from nature and a transcript of its constancy. ...

(d) And the less casual evidence of everyday speech is to like effect: "the people of these United Colonies," "your whole people," "the people of America," "the liberties of American," "the rights of Americans," "American rights," "Americans." The constant recurrence of such phrases in contemporary documents bespeaks the conscious identity of Americans everywhere in possession of the rights of men. Natural rights were already on the way to become national rights. The Higher Law Background of American Constitutional Law, edward S. Corwin, Cornell Univ. Press, Ithica (1984), p. 4, 5 8, 80.

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No. 93- 1148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCE,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

TINA KRAIL, LORI CHADWICK,
DEBORAH SMOLDORE AND JEANNIE HENDERSON

Petitioners

- against -

THE STATE OF NEW JERSEY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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NOT FOR THE PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-934-91T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALEXANDER V. LOCE,

Defendant-Appellant,

and

TINA KRAIL, LORI CHADWICK, JAMES MCWILLIAMS, CHRIS MOSCHINSKI, DEBORAH SMALDORE, WILLIAM HARRISON, JOHN ADAMS, LISA ADAMS, CHARLES MATSON, DANIEL LICKTEIG, JEANNIE HENDERSON, TYRONE MALONE, NEAL WEBSTER and RALPH TRAPHAGEN,

Defendants.

A-1233-91T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TINA KRAIL, LORI CHADWICK, JAMES

MCWILLIAMS, CHRIS MOSCHINSKI,
DEBORAH SMALDORE, WILLIAM HARRISON,
JOHN ADAMS and LISA ADAMS,

Defendant-Appellants,

and

ALEXANDER V. LOCE, CHARLES MATSON,
DANIEL LICKTEIG, JEANNIE HANDERSON,
TYRONE MALONE, NEAL WEBSTER and
RALPH TRAPHAGEN,

Defendants.

A-1258-91T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES MATSON, DANIEL LICKTEIG,
JEANNIE HENDERSON, TYRONE MALONE,
NEAL WEBSTER and RALPH TRAPHAGEN,

Defendants-Appellants,

and

ALEXANDER V. LOCE, TINA KRAIL,
LORI CHADWICK, JAMES MCWILLIAMS,
CHRIS MOSCHINSKI, DEBORAH SMALDORE,
WILLIAM HARRISON, JOHN ADAMS and
LISA ADAMS,

Defendants.

Argued June 2, 1993 - Decided **JUN 30 1993**

Before Judges Michaels, Baime and Wallace.

On appeal from Superior Court of New Jersey, Law Division, Morris County, whose opinion is reported at __ N.J. Super. __ (1993).

Patrick J. Mullaney argued the cause for appellant Alexander V. Loce (Mr. Mullaney and Cassidy, Foss & San Filippo, attorneys; Mr. Mullaney and Harold J. Cassidy, on the brief).

Richard J. Traynor argued the cause for appellants Tina Krail, Lori Chadwick, James McWilliams, Chris Moschinski, Deborah Smaldore, William Harrison, John Adams, Lisa Adams, Charles Matson, Daniel Lickteig, Jeannie Henderson, Tyrone Malone, Neal Webster and Ralph Traphagen (Mr. Traynor, attorney for appellants Tina Krail, Lori Chadwick, James McWilliams, Chris Moschinski, Deborah Smaldore, William Harrison, John Adams and Lisa Adams; Roger W. Daley, attorney for appellants Charles Matson, Daniel Lickteig, Jeannie Henderson, Tyrone Malone, Neal Webster and Ralph Traphagen; Mr. Traynor and Mr. Daley, on the joint brief).

Deborah Collins, Assistant Morris County Prosecutor, argued the cause for respondent (W. Michael Murphy, Jr., Morris County Prosecutor, attorney; Ms. Collins and John Connor, Assistant Prosecutors, on the briefs).

Lisa Glick Zucker argued the cause for amici curiae American Civil Liberties Union of New Jersey, Americans for Democratic Action, Choice PAC New Jersey, 80% Majority Campaign, Family Planning Association of New Jersey, League of Women Voters of New Jersey, National Abortion Rights Action League-NJ, National Council of Jewish Women, National Organization for Women, New

Jersey State Council of YWCAS, Planned Parenthood Affiliates of New Jersey, Right to Choose and South Jersey Catholics for Free Choice (Ms. Zucker, on the brief).

PER CURIAM

Following a trial in the Morristown Municipal Court, defendants were found guilty of defiant trespass, a petty disorderly persons offense (N.J.S.A. 2C:18-3b). Defendant Alexander Loce was assessed a penalty of $30 payable to the Violent Crimes Compensation Board. All other defendants were fined $250, assessed court costs in the sum of $25 and Violent Crimes Compensation Board penalties in the amount of $30. The Law Division again found defendants guilty after a trial de novo on the municipal court record. The same sentences were imposed except that defendant Loce was fined $250 and assessed court costs in the sum of $25 in addition to the penalty originally set by the municipal court. Three separate appeals from the Law Division's judgment were filed.

We need not recount the facts, which are fully set forth in the Law Division's oral and written opinions. Suffice it to say that all of the defendants entered a Morristown abortion clinic where Loce's fiancee was scheduled to terminate her eight week pregnancy. The defendants bound themselves with handcuffs and

bicycle locks in order to block the entrance to the operating rooms. Loce, who had previously been denied a restraining order, and the other defendants sought to prevent the scheduled abortion, but were ultimately arrested. Subsequently, the abortion was performed.

The municipal court permitted introduction of evidence regarding when human life begins and found that the fetus was a person. The court nevertheless convicted the defendants, holding that Loce's fiancee had a constitutional right to an abortion and that there was no legal justification for the trespass. The Law Division, finding no reason to decide when human life commences, determined that defendants wrongfully trespassed on the premises of the clinic and improperly used force to prevent a legal abortion. *State v. Loce*, __ N.J. Super __ (Law Div. 1993).

Although stated in a variety of ways, defendant Loce contends that (1) human life begins at conception and the unborn child enjoys the constitutional protection of due process under the Fourteenth Amendment to the United States Constitution and Article I of the New Jersey Constitution, (2) the genetic father has standing to raise the constitutional rights of the fetus and has an independent constitutional right to protect the unborn child, (3)

their rights are paramount to the privacy interest of the mother, and (4) the criminal prosecution constituted an improper intrusion upon the fundamental rights of Loce and the unborn child. The other defendants assert that (2) the Law Division erroneously excluded statutory defenses applicable to the attempted rescue of the "pre-born" baby, (3) the Law Division incorrectly refused to consider the "unrefuted proof" that Loce's eight week "pre-born progeny" was a live human being, thereby "decriminalizing their forceful rescue attempt," and (4) they have a right to assert the Ninth Amendment right to life possessed by the unborn child.

We now consolidate defendants' appeals and affirm their convictions. In reaching this result, we do not address the question when human life begins or whether that issue is justiciable. The right to an abortion guaranteed by the due process clause of the Fourteenth Amendment established by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, reh'g denied, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973) has only recently been reaffirmed in *Planned Parenthood of Southeastern Pa. v. Casey*, 404 U.S. __, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The purported rights asserted by defendants independently and on behalf of the fetus

are unsupported by case law, whereas the mother's rights, which they claim are outweighed, are firmly established. The simple and overriding fact is that each defendant committed a petty disorderly persons offense in an attempt to prevent a legal and constitutionally protected abortion. No amount of moral conviction as to the impropriety of the abortion would legally justify the offense or render its prosecution unconstitutional. However phrased, defendants' arguments to the contrary are clearly without merit. R. 2:11-3(e)(2).

Although not raised by defendant Loce, the fine and court costs imposed upon him by the Law Division must be vacated. A defendant who appeals from a municipal court action cannot receive a greater sentence after a trial de novo. *State v. De Bonis*, 48 N.J. 182, 188-89 (1971).

So modified, the judgments of conviction are affirmed.

Opinion and Judgment of Honorable Reginald Stanton

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
APPEL NO. 251-91

STATE OF NEW JERSEY,	)	
Plaintiff,	)	CRIMINAL ACTION
v.	)	OPINION
ALEXANDER V. LOCE, et al.,	)	
Defendants.	)	

Deborah Collins, Assistant Prosecutor (Michael J. Murphy, Morris County Prosecutor, attorney), for the State.

Patrick J. Mullaney for defendant Alexander V. Loce.

Roger W. Daley for defendants Charles Matson, David Lickteig, Jeannie Henderson, Tyrone Malone, Neal Webster and Ralph Traphagen.

Richard J. Traynor for defendants Tiny Krail, Lori Chadwick, James McWillliams, Chris Moschinski, Deborah Smoldore, William Harrison, John Adams and Lisa Adams.

Michael Patrick Carroll for New Jersey Right to Life, amicus curiae.

Lisa Glick Zucker (Deborah A. Ellis, attorney) for American Civil Liberties Union of New Jersey, American for democratic Action, Choice PAC New Jersey, 90% Majority Campaign, Family Planning Association of New Jersey, League of Women Voters of New Jersey, National Organization for Women, New Jersey State Council of YMCA's, Planned Parenthood Affiliate of New Jersey, Right

to Choose, South Jersey Catholics for Free Choice, amici curiae.

STANTON, A.J.S.C. As a result of intercourse with defendant Alexander V. Loce, Ms. Z became pregnant. She informed Mr. Loce that she had arranged for an abortion to be performed in a certain physician's office in Morristown on September 8, 1990. On September 8, Ms. Z would have been pregnant for about eight weeks. There was no problem with the health of either Ms. Z or the fetus.

Mr. Loce urged Ms. Z not to have the abortion, but she persisted in her announced intention to have one. On September 7, Mr. Loce applied to the Chancery Division of the Superior Court for an order prohibiting the abortion. This request was promptly rejected by the Chancery Division. On September 7, Mr. Loce appealed on an emergency basis from the Chancery Division's denial of relief to the appellate Division of the Superior Court and then to the New Jersey Supreme Court. Both appeals were rejected. On September 8, Mr. Loce, accompanied by 14 anti-abortion activists who are the other defendants in this matter, forced his way into the physician's office where the abortion was to be performed. All 15 defendants handcuffed themselves

together and physically blocked movement within the office with the intent to forcibly prevent the physician from performing the abortion. Defendants persisted in their violent obstruction of the office despite legal notice to leave. They were arrested and removed from the office by the police. The abortion took place on September 8, 1990.

All defendants were convicted of the petty disorderly persons offense of defiant trespass under N.J.S.A. 2C:18-3(b). Each of them was fined $250 and required to pay court costs and a Violent Crimes Compensation Board penalty. All defendants have appealed to the Law Division of the Superior Court and their appeals are now before me for decision. The present appellate proceeding is technically known as a trial de novo on the record below. R. 3-23-8(a). This means that I must make original findings and rulings on the evidence, but that I am limited to the evidentiary record created in the Municipal Court.

The record in this case establishes beyond a reasonable doubt that all defendants are guilty of violating the defiant trespass provisions of the New Jersey Criminal Code, unless some superseding constitutional or legal rule excuses or justifies disobedience of the defiant trespass statute. The defendants have

attempted to establish such supeseding constitutional rules and such superseding legal rules. They have introduced testimony of Jerome Le Jeune, M.D., Ph.D., a professor of genetics, of Bernard Nathanson, M.D., an obstetrician and gynecologist, and of Francis Russel Hittinger, Ph.D., a philosopher. The purpose of the testimony is to establish that the fetus being carried by Ms. Z was a human being on September 8, 1990 and had been a human being ever since the moment of its conception. (For ease of expression, I will use the term "fetus" in this opinion to cover the entire prenatal process, and I include within it stages which are technically more precisesly referred to as zygote, morula, embryo and fetus.)

Based on the claimed fact that the fetus was a human being, the defendants argue that it was a person within the meaning of the Fourteenth Amendment of the United States Constitution, which reads in pertinent part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The defendants also argue that the fetus was a person within the meaning of Article I, Paragraph 1, of the New Jersey Constiution which reads: "All persons are by nature

free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Based on the concept that the fetus was a person, the defendants also asserted statutory affirmative defenses under N.J.S.A. 2C:3-5 (the right to use reasonable force to protect another person), N.J.S.A. 2C:3-2 (the right to use force as being necessary to save a person), N.J.S.A. 2C:3-8 (the right of a person entrused with special responsibility for the care, supervising, discipline or safety of another person to use force to protect that other person); Mr. Loce being the father of the fetus) and N.J.S.A. 2C:3-10 (the right to seize property under certain circumstances to protect a person).

The most straightforward legal analysis of defendants' arguments that they were justified in disobeying the defiant trespass statute because of state and federal constitutional principles and because of state and federal constitutional principles and because of state statutory affirmative defenses is as follows: The United States Supreme Court has ruled that a fetus is not a person within the meaning of the Fourteenth Amendment or within

the meaning of any other provision of the United States Constitution. Roe v. Wade, 410 U.S. 113, 156-159 (1973). In Right to Chose v. Byrne, 91 N.J. 287, 299 (1982), the New Jersey Supreme Court expressly purported to decline to determine life begins or at what point a fetus is a person. But the court so clearly gave priority to the health claims of the mother over the life claims of the fetus (and without going through any balancing of rights analysis) that the necessary inference, in my view, is that the court actually treated the fetus as not being a person. 91 N.J. at 310. See also Giardina v. Bennett, 111 N.J. 412, 420-422 (1988), holding that a fetuss is not a person within the meaning of the Wrongful Death Act, and State in the Interest of A.W.S., 182 N.J. Super 278 (App. Div. 1981), holding that a fetus is not a human being within the meaning of the criminal homicide provisions of the Code of Criminal Justice. So far as defendant's claimed statutory justification under N.J.S.A. 2C:3-5, 2C:3-2, 2C:3-8 and 2C:3-10 is concerned, the language of the statutory provisions, the legislative history and the desirability of construing statutes so as to be compatible with constitutional limitations all lead me to conclude that the New Jersey Legislature in enacting the Code of Criminal Justice in 1978 probably did not intend to

treat a fetus as a person, and certainly not when doing so would limit a woman's constitutionally protected right to have an abortion. Here I must note that statutory provisions dealing with justification are to be construed in the context of ordinary, traditional crimes where we have independetly functioning people interacting violently with each other. If a fetus is a person, it is a person in very special circumstances --- it exists entirely within the body of another much larger person and usually cannot be the object of direct action by another person. In short, as a trial judge of the Superior Court of New Jersey, I cannot find any legally acceptable basis for excusing or justifying the conduct of the defendants in disobeying the defiant trespass statute.

I also note that when the New Jersey Legislature adopted the present Code of Criminal Justice in 1978, it abolished all common law crimes. N.J.S.A. 2C:1-5. It also repealed most pre-existing statutory crimes. N.J.S.A. 2C:98-2. The present Code of Criminal Justice does nto prohibit abortion or regulate it in any way. Hence, entire aside from judicial interpretation of the United States Constitution and the New Jersey Constitution, women have been legally free to have an abortion in New Jersey for more than 20 years. The Legislature could not have intended to authorize

other persons to use force to prevent a woman from doing what she had a legal right to do.

I am sure that defendants and their counsel have anticipated all along that a trial judge would be constrained to reach the legal conclusions which I have reached in this case. I believe that the real thrust of their proofs and their arguments has been directed at the appellate courts which may eventually hear this case rather than at stage. They would hope to have me as a trial judge make findings of fact which they might later use as a base for moral and legal arguments before appeallte courts. Ultimately, they would like to persuade the United States Supreme Court to overrule Roe v. Wade.

The particular finding of fact which defendants urge me to make is that a fetus is a human being from the moment at which the sperm and the egg unite. The testimony of Dr. Le Jeune, of Dr. Nathanson and of Dr. Hittinger is all directed (from varying disciplines and viewpoints) towards that end. I do not regard the question of when human life begins (or the related question of when the fetus becomes a person) as a religious issue, or an abstractly scientific issue, or a remote philosophical issue which is beyond the ken of lawyers and judges. It is an issue of practical

ethical importance and of very practical legal impact. Lawyers, judges, legislators and public policy makers have the right, and probably the duty, to address this issue. But they must addresss it in the right context, with caution, with the right sense of respect, with appropriate humility, and in circumstances likely to produce comprehensive data and rigorous analysis. Under the appropriate condition, I, for one, would be willing to make a judicial finding of fact on this issue.

However, the circumstances of this case are not appropriate for judicial fact finding of the kind sought by defendants. The factual record in this case was created in the Morristown Municipal Court in the course of a prosecution for a petty disorderly persons offense. In New Jersey, municipal courts deal with disorderly persons offenses and moter vehicle violations. Their procedures are somewhat summary in nature and are designed to produce fair and quick results in relatively simple cases. Municipal courts do not have the procedural tools or the time to deal with truly complex matters. They are not suitable places in which the adjudicate complicated factual or legal issues. See very generally, Belleville v. Parrillo's, Inc. 83 N.J. 309, 318-319 (1980).

Drs. LeJeune, Nathanson and Hittinger are persons of some

distinction whose testimony was interesting and thought-provoking. So far as it went, it was arguably plausible. However, the direct examination by defense counsel was highly unstructured. The municipal prosecutor conducted cursory cross-examination because he thought that the witnesses' testimony was irrelevant to the true legal issues in the case. The prosecutor presented no witnesses at all on the issue of when human life begins, again because of preceived irrelevancy. The examination of witnesses was non-probing and the proceeding was totally non-adversarial on this issue. The proofs were so limited and so one-sided that a judge cannot sensibly make a definite finding of fact based upon them.

Furthermore, there has been no careful argument or analysis in this case on the threshold question of whether the issue of when human life begins is an empirical question of fact or an essentially non-empirical value judgment. In any event, whether the issue is one of fact, or of value judgment, or some subtle mixutre of afact and value judgment, I will not undertake to make a finding or ruling about when human life begins under the conditions obtaining in this case.

I also note that even if we were to take it as established

that human life begins at the moment of conception, that is, when the sperm and the egg unite, it would not necessarily follow either morally or legally that the State could properly use compulsory processes of law to prevent a woman from having an abortion, and it would not necessarily follow that private persons could properly use physical force to prevent a woman from having an abortion. If a fetus is a human being from the moment of conception onwards, I think it would then follow that an abortion would be a serious moral wrong under almost all circumstances at any time during pregnancy. People who though that a fetus was always a human being (and, indeed, many people who thought that a fetus was only potentially a human being), would probably develope a whole series of interrelated moral rules.

They would encourage men and women to conceive offspring only when they were committed to brining them into the world and raising them to competent adulthood in a reasonably supportive and loving family environment. They would try to prevent unwanted pregnancies and irresponsible pregnancies. To those ends, they would discourage sexual relations outside of loving, mature and stable relationships, and whenever sexual relations did occur they would encourage the use of effective

contraception unless both the man and woman affirmatively wanted a child and were firmly committed to the responsible rearing of the child.

If abortion is viewed as morally wrong under most circumstances, then it seems to me that the first line of attack should be to reduce unwanted pregnancies. Well-designed and effectively implemented programs to promote sexual morality and to promote effective contraception could probably effectively reduce the number of unwanted pregnancies and the number of abortions. However, given the volatility of the human sexual drive and given the inevitable failures of contraceptive measures, I am sure that we will always have a significant number of unwanted pregnancies. When an unwanted pregnancy occurs, if we regard the fetus as a human being, then the woman involved would be under a moral obligation to carry the pregnancy to term, except u nder very special circumstances involving things such as rape or serious risk to the woman's life. The husband or other male co-responsible for the pregnancy would be morally obliged to be supported of the women in sustaining the pregnancy and in raising the child. Concerned persons around the pregnant woman would encourage her to bear the child and would take steps to empower

her to do so with dignity and in safety.

Here I think it is useful to say something about the relationship between morality and law. The legal rules of a society are informed by its moral values and are broadly reflective of them. (This is especially true in the area of criminal law.) Legal rules, in turn, ofetn influence our perception of what is moral. However, law and morality are not and should not be identical. There are many important moral principles which cannot and should not be translated on a one-for-one basis into enforceable legal rules. This is particularly true in a society which is free, open and pluralistic and which is legally organized as a constitutional democracy.

In the kind of society which we have in New Jersey and in the United States, if we were to treat a fetus as a human being from the moment of conception onwards, and if we were to treat abortion as morally wrong under almost all circumstances, we would probably adopt some legal rules reflective of that moral value. We would probably have criminal laws protecting women against abusive men, we would probably have health laws making prenatal care available to all pregnant women, we would probably have health laws making medical care available to children, we

would probably have laws providing affordable housing for families, we would probably have laws making child care available to working mothers. In fact, we already have some of these laws, because virtually all people think it is right to take at least some legal steps to empower women who want children to bear them safely and raise them decently, even though many people also view abortion as morally valid under many circumstances.

In our society, it might come to pass that most people would view the fetus as a human being from the moment of conception. The interpetation by United States Supreme Court of the United States Constitution might evolve in such a way that federal constitutional limits on anti-abortion laws would be removed. Indeed, such an evolution may be taking place at the present time. See Webster v. Missouri Reproductive Services, 492 U.S. 490 (1989). A similar process could occur with respect to the New Jersey Supreme Court and the New Jersey Constitution. Or the people might by formal amendment remove existing constitutional limitations. Even if all those things were to happen, I would hope that our legislatures would be wise enough not to recriminalize abortion.

When the law makes it a crime for a woman to have an

abortion, or when the law makes it a crime for a physician to perform an abortion, the state is then using legal proces sto force a woman to carry a pregnancy to term even though she does not want to do so. This inherently involves pervasive governmental intrusion into the internal bodily processes of the woman and into her most intimate emotional and psychological functioning. Many women (and many of the men around them) would feel cruelly violated. They would be bitterly resentful. There would undoubtedly be compliance problems, and, if criminal anti-abortion laws were to be uniformly and effectively enforced, there would probably have to be overt and widespread coercion of substantial numbers of people. The general result would probably be state-sponsored oppression on an enormous scale. I suggest that a legal policy of criminalizing abortion would be most unwise. It would also be unjust and morally wrong.

Even though one might agree with the defendants that a fetus is always a human being, and even though one might agree that abortion is morally wrong, I would suggest that wise moral policy and wise legal policy would seek to help women to avoid having unwanted pregnancies, and when women did become involved in unwanted pregnancies, it would seek to encourage and

empower them to sustain the pregnancies and to rear the resulting rchildren under safe and supportive circumstances. Here it is important to reflect upon the special circumstances in which the fetus exists -- it exists entirely within the body of its mother. If the mother is unwilling to carry out her moral duty to sustain the pregnancy despite our encouragement and our efforts to empower her to do so, then the only fully effective ways in which the rest of us can help the fetus are by literally cutting open the body of the mother and taking out a fetus which has reached the point of viability, or by literaltaking control of the mother's body and monitoring all her activities minute by minute, day by day, until she gives birth. Most of us are not willing to give such power to the state, and we would be less willing to give it to private parties such as the defendants. Human experience teaches us that limitless power to do good can too readily become unlimited power to oppress and to enslave. Accordingly, wise moral policy and wise legal policy would stop short of coercing women to have children against their will.

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Much of what I have said above with respect to abortion is not directly applicable to the actual circumstances in which

defendants find themselves. When the defendants used force on September 8, 1990 to physically prevent Ms. Z from having an abortion, Ms. Z had the right under the United States Constitution, under the New Jersey Constiuttional and under federal and state statutory law to have an abortion. Defendants disagreed with the constitutional rulings involved and with the statutory laws. They had the right to disagree and they had the right in our free, open, constititutional democracy to work lawfully in a wide variety of ways to change existing constitutional and legal rules.

When the defendants forced their way into the physician's office on September 8, 1990 to physically obstruct the physican and his staff from performing the abortion and to physically obstruct Ms. Z from having the abortion, they used violence. The violence was not as bad as striking the physican, or the staff or Ms. Z would have been, but it was real violence, significant violence. When the defendants employed that violence, they, in effect, asserted that they were not bound by the normal decencies and constraints of our constitutional democracy. They asserted that they had the right to impose their views about abortion by physical force upon Ms. Z. They also asserted that they had the right to impose their views by force upon society in general. When

they did that, the defendants mounted a frontal assault upon the whole concept of ordered liberty by which our society is governed. They trampled upon the fundamental constitutional values by which we conduct our civil society.

There is undoubtedly much room for disagreement about what our society's approach to the problem of abortion should be. However, I see little room for disagreement about the wrongness of the way in which the defendants conducted themselves on September 8, 1990. Their general intent may have been good, but what they did was profoundly wrong. Each of them deserves the condemnation of a criminal conviction. Each of them is guilty of defiant trespass. Each is fined $250. Each of them must pay court costs of $25 to the Morristown Municipal Court. Each of them must pay a penalty of $30 to the Violent Crimes Compensation Board.

/s/
Reginald Stanton
Judge of the Superior Court
Assignment Judge

RS:amg
514-91

W. MICHAEL MURPHY, JR.
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ATTORNEY FOR THE STATE OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
CRIMINAL PART
APPEAL NO.: 251-91

THE STATE OF NEW JERSEY,

Plaintiff,

vs.

ALEXANDER V. LOCE, ET AL.

Defendants.

THIS MATTER having been heard before the Court on the 6th day of September, 1991, in the presence of Deborah Collins, Assistant Prosecutor, appearing for the State, and Patrick J. Mullaney, Esq., attorney for defendant Alexander V. Loce, Roger W. Daley, Esq., attorney for defendants Charles Matson, David Lickteig, Jeannie Henderson, Tyrone Malone, Neal Webster and Ralph Traphagen, Richard J. Traynor, Esq., attorney for defendants

Tiny Krail, Lori Chadwick, James McWilliams, Chris Moschinski, Deborah Smoldore, William Harrison, John Adams and Lisa Adams, Michael Patrick Carroll, Esq., attorney for New Jersey Right to Life, amicus curiae, and Lisa Glick Zucker, Esq., attorney for American Civil Liberties Union of New Jersey, et al., amici curiae; and the Court having read the transcript of the Morristown Municipal Court and having heard the oral arguments of counsel; and for good cause shown:

IT IS ON THIS 17 day of September, 1991,

ORDERED that the defendants are found guilty of N.J.S.A. 2C:18-3b. *Each and every defendant is guilty.*

The reasons for this decision are set forth in the oral opinion of the Court, delivered on September 6, 1991.

/s/ Reginald Stanton
REGINALD STANTON, A.J.S.C.

REGINALD STANTON
JUDGE OF THE SUPERIOR COURT
ASSIGNMENT JUDGE

MUNICIPAL COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
CRIMINAL ACTION
DOCKET NO. C1771, ET SEQ.

STATE OF NEW JERSEY,	*	
	*	
V.	*	APRIL 23, 1991
	*	
ALEXANDER LOCE, et als.	*	
	*	
Defendants.	*	
	*	
- -	*	

B E F O R E: HONORABLE MICHAEL J. NOONAN

* * *

Testimony of LeJeune, Nathanson and Hittinger

JEROME LEJEUNE, M.D., Ph.D., having been duly sworn according to law, testified as follows:

THE JUDGE: Doctor, I heard you pronounce your own name and we butchered it. So you may have a seat.

All right, you may proceed, counsel.

DIRECT EXAMINATION BY MR. MULLANEY:

Q Doctor LeJeune, could you please for the record, state your name and how to spell it?

A Your Honor, my name is Jerome LeJeune.

Q We did butcher that one.

A Yes. I am a professor of fundamental genetics in the Child's Hospital of Paris and the Faculty of Medicine of Paris.

And I began as a pediatrician and then I became a geneticist. Now I am a pediatrician and a geneticist.

And in my consultation, which is probably the biggest in the world for mentally retarded children having difficulty due to a chromosomal mistake, we examine every year 2000 children, and we have record of 30,000 of them.

So our job is really to try to understand what makes the nature of every human being; why some of them are afflicted by constitutional difficulty, and to try later to treat that, if we can, so that we would be able to some day to bring them back to normal; and to give them what nature has refused to them.

Q Dr. LeJeune, could you please tell the Court a little bit about your educational background?

A As I said I was MD and PhD, and have been always in Paris as a student.

And later when I finished my studying and I got my degree in medicine and genetics, I was representative of France and in the United Nations scientific committee on the danger of atomic

radiation, because of geneticist.

And in that function, international function, I came very often to the United States to go to the UN and I met one professor of California Institute of Technology.

And I was invited to give the first course of human genetics in Cal Tech because in this highly educated university they had not yet had any course of human genetics.

They had a lot of course in fundamental genetics. I was the first professor of fundamental genetics in Cal Tech.

Q As part of your serving on this committee, Doctor, did you have opportunity to go to the Kremlin in Moscow and meet with Mr. Brezhnev?

A Yes. That is as a geneticist, I was vice-president of the Genetic Congress in Moscow and I was known by my fellow professor of genetics in Moscow and because I am a member of the Pontifical Academy of Science and because I was a member of the, of a special group that we had to study of the dangers of atomic war I was sent by the Pope, John Paul II, to Moscow.

It was around three days after Mr. Jaruzelski had declared the war against people of Poland; in other words, declared a state of war against its own population.

And because we had prepared the reports about the dangers of -- as a specialist I was only speaking of the genetic dangers of the atomic war, then the Holy Father wanted me to be presenting a report all the powers of the world who were having the atomic power.

And so some of us of the Pontifical Academy of Science went to America to see Mr. Reagan and some came to France or England to China and India. And I was sent by the Holy Father to see Mr. Brezhnev.

And it was a very curious situation. But I am not going to talk too much about that.

Q Dr. LeJeune, you have been credited with the first discovery of the first chromosomal abnormality in man.

Could you please tell the court about your discovery of Down's Syndrome?

A Yes. Down's Syndrome is a very peculiar disease in the sense that the baby who are born with it owe their difficulty to an excess of genetic material.

And it was long ago, nearly thirty years ago that I discovered that they had an extra chromosome and this chromosome is now known as number 21.

The classification of chromosome was not yet established at that moment because it was the first disease to be discovered to be due to this chromosomal defect.

And those babies, in fact, suffer because they have too much of those table of law of life which we call chromosomes.

And to make a very complex story short I would say that inside the chromosomes are written in a very special ribbon, which is DNA, all the tricks of the trade to be a human being, if those chromosomes are human chromosomes.

If they are chimpanzee chromosomes, all the tricks to be a chimpanzee are written.

Q Doctor LeJeune, we are trying to qualify you as expert at this point.

A Yes.

Q We will get into that in a minute. I hate to cut you off because it's an interesting story. For your discovery of Down's Syndrome did you win any awards?

A Well, I had the honor of receiving the Kennedy Prize from the hands of the late president and, because of this discovery, and I got also the William Allen Memorial medal in this country which is the highest prize that you can get in genetics in the world.

It is given by the American Society of Human Genetics in this country. I received it in San Francisco.

Q What year was that, Doctor?

A Oh, I am not good with remembering the times. It was, if I'm correct, around '62 or '64. I think that the Kennedy Prize was '64.

Q Could you tell the court --

A That's -- I'm sorry. I don't remember.

Q Could you tell the Court of any other boards or academies of which you're a member?

MR. BANGIOLA: I am prepared to stipulated the witness is an expert in genetics. Excuse me.

MR. MULLANEY: Your Honor, it is just not that often we get someone with the stature of Dr. LeJeune. But if the Court is willing to recognize him, I offer the Court Dr. LeJeune as expert in genetics and human reproduction.

THE JUDGE: And prosecutor is willing to stipulate that?

MR. BANGIOLA: Without objection.

THE JUDGE: The doctor who discovered Down's Syndrome is an expert in genetics.

MR. BANGIOLA: Doesn't seem like much of a stretch.

THE JUDGE: I will accept that stipulation and I welcome you to the Morristown Municipal Court.

THE WITNESS: Thank you, your Honor.

THE JUDGE: All right. You may continue.

BY MR. MULLANEY:

Q Thank you, your Honor. Dr. LeJeune, could you please describe the process of human reproduction?

A It is a very long story, your Honor. Because life is with us since millennia. But if life continue from generation to generation each of us has a very unique beginning, which is at the moment that all the information necessary and sufficient to be that particular human being, which we will call later Peter or Margaret, depending on its own genetic make-up, when this whole necessary and sufficient information is gathered.

And we now know from experience both in animals and now in human beings, that this moment is exactly the moment at which the head of the sperm having penetrated inside the ovum, then the information carried by the father encounter in the same recipient cell, the information carried or transmitted by the mother; so that suddenly a new constitution is spelled out.

It is very curious that biology and the science of the law are

speaking the same language.

From a person strongly willed and with good health we'd say he has a felicitous constitution. And from a state in which every person is protected by the law we say it has an equitable constitution. And from a state in which every person is protected by the law we say it has an equitable constitution.

And exactly as in a free country no law can be enforced if it has not been entirely spelled out and voted for, we have the same process in biology, that a new human being does not come into existence until all the specifications which spell out its own personal constitution are, have been there.

And the voting process even exists in biology, which is the choice of the sperm.

Because there are maybe hundreds or thousands of 10 thousands sperms swimming around one egg, and one is elected. And that is a voting process.

And at the moment the human constitution is entirely spelled out a new human being begins its career.

That's not rhetoric. That's not fancy, or hope of a moralist. It is just an experimental phenomenon.

Q Dr. LeJeune, where is this information specifically

contained?

A This information is specifically contained in two different support. One is DNA. DNA is a long thread molecule. And to give you an impression, your Honor, this flat ribbon is roughly comparable to the tape that you could have in a tape recorder. But it is very minute.

Inside the head of a sperm there's a long thread of one meter, one yard say. And this is so tightly coiled in 23 little pieces that we call chromosomes that the whole thing is inside the head of the sperm and it is, the volume of it is upon the point of a needle.

In the first place in so small a volume, all the data which will spell out the way to build all the proteins which will make the machine tool inside the cells is entirely spelled out.

The same is true in the ovum, in which 23 little pieces of chromosomes one meter long all together stay there until they receive the help of the 23 from the father. Now that's part of the information and it is a text book.

Most of the people will stop there and tell you genetic information is carried by DNA.

That's perfectly true. But there's another type of

information the amount of which is even much more important and much bigger, which is inside the cell.

Inside the ovum there are, there have been prepared billions of molecules highly specialized who will recognize and be recognized by the signals given by the genetic make-up.

And to make the thing understandable, remember, that while you use a tape recorder if you buy a mini cassette in which the music of an artist such as Mozart is recorded, then if you put it in your tape recorder, you will get a symphony.

But curiously on the tape there are no notes of music, and inside your tape recorder there are no musicians.

Nevertheless, by a special code written on the tape, some information is given to you tape recorder so that it will read it and it will make the air moving by the loud speaker so that what is coming to you is not the orchestra, not the musicians, not evidence of music, but the genius of Mozart.

That's the way life, the symphony of life, is played. That is inside the egg, which receive the tape bank from father and which has its own tape bands, and which makes 23 plus 24, 46 volumes of the table of the law of life.

The cassette itself is a tape recorder and inside the tape

recorder, to build the tape recorder you need an enormous amount of information to know now to build the machine, how to use the material, how to do the whole thing which is a tape recorder.

Now when you speak about genetic information you have to remember you have the long ribbon of DNA which are the mini cassette of the symphony of life, but you have the cell itself which is the magnetiphone, which is a magnetiscope, which is the tape recorder; and which has an enormous information.

Because the tape recorder, to read a tiny ribbon like this is a fantastic machine, extremely complex.

Then to answer your question it's very difficult to spell out the amount of information in the first cell.

We can do it easily for the ribbon because we know the number of betas, of bytes of information which are there, some 50 billions, but inside the egg the number is much higher, and nobody for the moment can measure it and can count it.

But we can say safely that when we look at the Cray Two, this enormous computer that just -- we just recently put another, the power of a Cray Two is vanishing in smoke -- compared to the amount of information which is inside one reproductive cell once the fecundation has occurred.

Q Dr. LeJeune, fecundation being the French phraseology for, what do we call it?

A Fertilization.

Q Once fertilization, once conception has occurred, could you tell the Court is anything added after that point?

Does Peter or Margaret come into being, so to speak, through addition information?

A Well, that was a very interesting acquisition of modern science. Because for a long time it has been believed that the opinion that the mother, the feeling of the mother, could do something to the baby.

And we know now that everything is written inside the first cell. I have to come back to this concept of conception, because it is a very remarkable fact that in all the languages coming from Latin, we use the same word either to express an idea which is come into our mind, or to a new being coming into life.

We conceive an idea. We conceive a baby. A baby is conceived. Conception do apply just as well for defining what will animate a matter in a human nature or what will animate your mind within your idea.

And that is, so to speak, an extraordinary description of

reality which is at the very beginning the information and the matter, so to speak, the spirit and the body are so intimately interwoven that we use the same word to say spirit animated by your ideas, or life of a new human being animated by genetic property; conception.

Now this moment a new human being is conceived is, really, as for the conception of a new constitution, when the whole thing has been spelled out.

Now we know and I think there's no disagreement among biologists everywhere in this world that after fecundation no new information goes in.

Everything is there at the moment of the, just at the moment after the entry of the sperm, or it is not enough and it will fail.

Either the whole information for the human being is there and the human being can develop and organize, or it is not there and no human being will develop at all.

Now nature has invented an extraordinary device to tell us that nature do protect the privacy of the very first stage of the human being. The right of privacy is written in that way in biology.

The egg is a little sphere of one millimeter and a half as a diameter. But it is not naked. It has some plastic bag around that we call from Latin zona pellucida, because you can see through --

Q Would you spell that?

A Zona pellucida? I am sorry. I can't spell in English.

MR. MULLANEY: We couldn't pronounce your name either.

THE WITNESS: I can write it down.

MR. MULLANEY: Z-o-n-a

p-e-l-l-i-c-u-d-a?

A That's correct. And this very curious plastic bag so to speak is, in fact, the perfect control of the privacy of the new being because as soon as the head of the sperm who got first was able to burrow inside the zona pellucida, as soon as the head comes inside, suddenly in a micro-second, this lucida, this transparent membrane becomes suddenly changed physically, and it becomes entirely not permeable to any other sperm.

It's a mechanism of an extraordinary precision which prevents that many sperm could go inside the one egg.

Because you need only one sperm to one egg to build a human being or to build any other being, if it is bi-sexual reproduction.

Q Dr. LeJeune, why would you say that the fertilized egg, or would you say that the fertilized egg, is a member of the human species?

A I would say it for a great number of induction, scientific induction, and by some experimental observation directly.

Q Could you explain those to the Court?

A Yes. For example when I spoke about the chromosomes, it would be very long before we can read all the information written on it.

You know that there's an enormous project which is a human genetic project especially in this country. It costs billions of dollars.

And it is supposed to read all the, what is spelled out inside the chromosomes. We have not yet achieved that.

We can read small segments but it is enough. Then we are not in a position of reading the whole table of the law of life which are inside the volumes which are what is called the encyclopedia of life.

But we know we have 23 volumes coming from father and 23 from mother. And on the 46 of them we can read what is written on the back of the volume, so to speak, the name of the

volume, because the chromosomes have a form.

They have a given length, a given position of the centromere (phonetic) and inside the little head of the chromosome we can see little bands which are typical of each part of our gender.

It is so simple, although it takes maybe one year to be able to recognize all of it, that in a month from now I will have to correct the examination of cytogenetics in the University of Medicine in Paris and I will show to some of the students pictures of the chromosomes of a chimpanzee.

And on the picture was a chromosome of a man. And the one who could not tell me this one is a man, this one is a chimpanzee, would fail that examination. It is that simple.

Q Doctor LeJeune, it is your testimony that there's a physical difference between the chromosomal make-up, a physical difference, of the human being and every other species?

A Well, that's no doubt. There's no other species which has the same chromosomal constitution as human being.

But that is not true especially for us. It is true for every species. We can look at the chromosome of a chimp and say this one is a chimp. This is an orangutan. This is gibbon and this is a

gorilla.

Each species has its own shape of chromosome that we can recognize.

Q At what point in the human reproductive process does human specificity exist?

A It exists at the beginning, that is the fecundation, at fertilization, at conception.

Q It is your testimony that if one were able to observe a human fertilized egg having not divided yet and one of a chimpanzee having not divided yet, that there would be physical differences?

A I have no doubt and very easy to recognize. The only difficulty is that because there's only one cell, if you look what is inside that cell you will kill that cell. And I am not going to do that in a human embryo, in a human being.

But I would have no reservation to do that job with a fertilized egg of a mouse and it's done, has been done repeatedly.

And you can look at the chromosome and see it is a mouse and not a rat. It is as simple as that. So it's not any longer inference, a deduction. It is just plain observation.

Q Dr. LeJeune --

A But I would add just that if it was not true, life would not be possible.

Q Why is that?

A Because if the first egg was not belonging to a given species at the moment it is conceived, the species would not exist at all.

And you would see that sometime an elephant can begat a mouse and it does not happen. Then we know by just common judgment that it has to be like that.

Now science has the advantage today that not only we can say by logic, well, sure it should be like that; we can say now by looking at it, we are sure it is like that.

Q Dr. LeJeune, could you tell us about the Jeffrey bar code and the process of methylation?

A Well, that is a very interesting piece of information which dates from around four years now, that a British gentlemen, Mr. Jeffries, invented that there were a part of the chromosomes in which the DNA was repetitive.

That is, the same sequence is repeated ten times, twenty times, a hundred times.

And it is supposed now that those sequences are a

recognition system, how to build the nucleus, how to have this long ribbon going around and not being knotted, so to speak.

And, well, not to be too complex, what Mr. Jeffries found was that because those repetitive DNA many change by mutation can occur in those fragments without doing any harm because some of the sequence will still be good and the race is repeated.

And then they found a trick so that with a special enzyme you could cut this DNA, have it migrating on a special substrate and having it recognized by a given probe that the result it -- the technique would be a little to explain.

But the result is very obvious. It looks very much like the bar code that you have in a supermarket.

You know when you buy now something in the supermarket, instead of writing the price and what it is, there are various lines of various widths, of various distances and with an optic reader.

You just go through the bars and it tells inside the computer what it is product and what you should pay for it.

How the Jeffries system does exactly the same thing, that is, having extracted the DNA, and having looked at it with that technique you see the bar code of the person.

And the demonstration by Jeffries was again, the demonstration that what was inferred to be, was correct: that is, each of us is absolutely unique, that is the sequence of bands is absolutely typical of the person you're looking at.

Q Dr. LeJeune, that's specific within the species, as to an individual within a species?

A It is specific of the species, that's correct. But it is specific of the individual.

Q So if I could frame the question?

A It is personal to an individual. It is so to speak its identity card, which cannot be falsified because you have this identity card written in each of your cells.

In all of your cells it is always the same pattern that you would get if you were looking at it.

But this pattern is not only typical of each of us. But if you look at the pattern of the DNA by the Jeffrey's picture of dad and mom of this person, we will see that this person has a sequence of the bar code which is personal to this person.

But we will see that half of the bands were present in Dad, and half, the other half was present in Mom.

So that we can recognize at one glance beyond any

discrepancy in calculation that this person is the progeny of those two persons.

And we can demonstrate that no other persons in the world has exactly the same bar code.

Q At what point does the individuation take place?

A Oh, that takes place at fecundation, at fertilization, at conception. Because it just tells us that the constitution of this person is personal to this person.

Q Dr. LeJeune, it is your testimony that we have at conception both species specificity and a casting of the individual within the species?

A Yes. And I would say that very soon we will build machines very comparable to the supermarket with an electronic reader so that we will go through a bar code and have the whole thing studied by computer.

Just for the moment we look at it. But it could be done by computer, exactly like in the supermarket.

But the only thing that the biggest computer will never tell us will be the price of the human life.

Q Dr. LeJeune, based upon the empirical data you presented do you have a conclusion as to what exists at the

moment of fertilization?

A Well, at the moment of fertilization what exists is a pure novelty. It has never occurred before.

It's a new constitution of a new personally devised constitution for this person.

Q It you had to give it a name what would you call it?

A I would call it a human because I know that the whole information is human. I can read it. I can see the dimensions and make up of the chromosomes.

I can be sure it is human. Now I would say it is a being because I know it is by its own information that it will develop itself.

It just needs nurture and protection. It is just what it needs. Then being human, it is a human being.

I would not have any definition other than it is a human being. But if I could say a word about a second discovery, because what I felt in France, the curious decision of the Supreme Court in America.

I was surprised by one phrases which was that it was not possible to reach agreement on when human life begins.

But that was 18 years ago. And Jeffries system was not

known, and what was not known is now the Sorimy (phonetic) and many others which I will not quote all of them by their name which is the methylation of DNA.

If I am allowed, your Honor, it is very complex. It's scientific jargon. But it is directly relevant to the notion what is a human being at it's beginning and it dates from the last four years and the developments of less than six months ago.

And if I can say a word about it I will try to make it rather clear if I can.

THE JUDGE: All right, Doctor. I would like you in doing that to answer two questions.

THE WITNESS: Yes, sir; your Honor.

THE JUDGE: Number one, in doing your description I want you to tell this Court if you can answer the question: What is a human being; and when does a human being come into existence? When does human life begin? In that context if you can, answer those two questions.

THE WITNESS: Well, I will start again by the third one, your Honor, with your permission, that human life never begins. It continues because human cells are alive. And we come from cells from our parents.

So that the continuity of life is no question. And if you ask me when human life did begin, you ask me when the first human being came into existence.

Not me, not us, but our forerunners. And that would b e an evolution description which I would be very interested to discuss with you. But maybe it is too far back.

THE JUDGE: I will rephrase the question.

When does each unique constitution come into existence?

THE WITNESS: Then I will go back --

THE JUDGE: In the continuum?

THE WITNESS: Yes, the human constitution happens at the moment the genetic information coming from the father goes in the cell which is ready to have it, which is the female cell.

And once the zone pellucida has closed entirely, the information is locked in. No one can enter later. And all of it has to be there.

To answer your question when does this special constitution begin, it's very simple; at the moment which is micro-seconds of the change of the zona pellucida which now is locking in this particular human constitution which is a new being.

Now what is a human being? That's very simple. A human

being has to be human, has to be a being. Then a human being is only a member of our species.

An egg of a chimpanzee can't be a human being because it is a chimpanzee being. But every time that genetic information is human, every time that this message which is at the beginning of life which is alive and which is life, as soon as this message is really a human message then this life is a human life.

And if it is a being, this being is a human being.

THE JUDGE: Next question.

MR. MULLANEY: Thank you, your Honor.

BY MR. MULLANEY:

Q Dr. LeJeune, could you describe as we go through human development in the physical sense, what happens to the level of information contained in any one cell?

A That was a very complex subject, but when I began my study in genetics, because it was calculated that we have possibly 50 thousand genes in one cell, then we have 50 thousand genes in this little sphere of one millimeter and one-half which is a fertilized egg.

Now if all of them was performing their duty at the same time, the amount of energy would no only play the symphony, it

would seem to be exploding.

It's simply impossible that all the genetic information is dictating all that it knows at the same time.

Exactly like in a company, in a polite company when somebody is talking the others have to listen.

Then they can interrupt and they can say what they have. But if all of them are speaking together, it doesn't work.

Q But Dr. LeJeune, everyone is there even though they are not speaking; is that correct.

A Yes, sure. Everything is there.

But now the order is to be given by another instruction.

Now we come to the second level I wanted to speak about, your Honor, because it was totally unknown four years ago.

Which is that not only that this ribbon of DNA has a message written letter by letter, piece by piece, in the DNA and the sugar phosphor back bone.

But this ribbon is not as dull on the tape as the tape we put in the tape recorder.

Because superimposed to the basic information there are some indication this part must be read immediately, this part is to be read later.

And the way it is achieved is by methylation of cytosine which is all on the piece of DNA.

Q Could you spell methylation, Doctor?

A I will write it down. Methylation of cytosine, just to be clear.

But now, what it means is exactly what does a good student do when preparing an exam? He has to underline some parts of the book because he has to know that immediately tomorrow.

And some parts he cross because he doesn't want to learn it just now and he will come back to it later.

Now it is what is meant by the methylation processes, the message is well written and everything is written to make a human being, to be a human being.

But at the moment of fecundation part of the DNA coming from father is underlines in the male way and the DNA coming from mother is underlined in the mother way.

And, therefore, the fantastic discovery was never expected I may say ten years ago. Nobody predicted it; that, in fact, father underlines instructions to make immediately the membranes inside which the embryo will develop itself, so to speak, its space

capsule; and to make the placenta which is the body by which it will take the nutrients from the vessels of mother.

That's underlined on the sperm, not on the egg. But on the egg what is underlined is all the tricks of the trade to make the spare pieces which if they are put together will build an individual.

Now it is extraordinary because it was a moving observation for geneticists to see that in this one millimeter and a half sphere of living being, this separation of the tasks which we see in the ordinary life, building the hut and go hunting that is typically of the man.

And the man in biology builds the membranes which is the shelter and the placenta which is a gathering food system.

On the other hand it is to the feminine genius to underline the way how to manufacture a baby.

And all that is written in the first cell. Now what was the greatest consequence of the discovery was that it is impossible and it is definitely ruled out to make a genetic constitution from one parent only.

That is, it is not possible in an egg to put only two pronucleii coming from mother. It will not be a human being. It will be a teratoma and it will make spare pieces.

It will make skin, hair, teeth, some nervous -- cells.s But not at all build a form. There will be no baby.

On the contrary if on an egg you remove the maternal nucleus and you put two paternal nuclei it will not be anyway a human being.

It will produce membranes and tiny placenta it will make cysts and cysts and cysts and we call it is a molar degeneration, a mole degeneration. Molar degeneration.

And it needs absolutely to have on the first cell this DNA underline by methylation of the male way and the DNA methylated on the female, feminine way to be a human being.

Now we come to an extraordinary observation that the only cell in all my life in which those two methylation systems from father and from mother were present together inside one cell was in the ~~first~~ cell which gave me life.

Because progressively at each division this methylation is erased and replaced. And progressively cells learn by a cascade of reaction to specialize.

So that one will make nails, another will make the brain, another will make the liver and another will make the bones and another will make the muscle.

For example, I read only two months ago, that the male way of spelling is obligatory for muscles. And muscles are, we know, much stronger in males than in females.

But even in the female the information which build the muscles has to be underlined in the -- coming from father -- in the paternal way and remains that way so that muscles can be made.

And we are just beginning to understand that in fact this way of underlining the message which is different in father and in mother is the secrete that life is using, so that it can epitomize in one cell which a mathematician would say it is reduced at its simplest expression.

But everything it does, so that if you expand the polynomials like a mathematician will do, progressively, because everything was in the first formula but you have to express it progressively, cells will specialize and we will have this very curious bi-pedal form that we have.

Q Dr. LeJeune, as the being develops does it retain its individuality and its membership in the human species?

A Totally. We, each of has never been a chimpanzee. And we are not going to become one.

And the chimpanzee are the ones which has the

chromosomes closest to our own constitution is the reason I take that example.

No baby goes through different species. It belongs to its own species from the very beginning. And that's true to every species. It's not a special feature of humanity.

But what is written in the human fertilized egg that is in a human zygote, in the human being of one cell, what is written is this humanity.

Q Dr. LeJeune, at eight weeks how would you describe that being?

A I would describe that being indeed as a human being. But to tell the Court what it looks like, I would say it's Tom Thumb.

Q Tom Thumb?

A Tom Thumb. Because the human being at eight weeks is the size of my thumb.

That is from the head to the rump, he measure one inch. And if you were looking at one of them having never seen anything about human embryology, if I had an eight weeks human being in my fist you would not see I had anything inside.

But if I was opening my hand you would see a tiny human being with fingers, with toes, with a face and with the palm prints

you could read with a microscope.

You would see the sex. And this story of Tom Thumb, of the tiny human being smaller than the thumb which has always enchant the young babies and the great mothers, is not a fancy.

It is a truth. Each of us has been a Tom Thumb in the womb of the mother, in this curious shelter, in which only some red light, dim light comes in, in which there is very curious noise, one loud, and strong, and deep hammering which is the heart of the mother and which bangs around a decemberate (phonetic) of a counter bass.

And the other would be a very rapid, like the maracas. And it will come from the heart of this tiny human being.

And those two rhythms which we now can detect with hydrophones are typical of the most primitive music any human ear has every heard, which is the symphony of two hearts; the mother one like the counter bass, 60 times per minutes; and the baby one like the maracas like 150 per minute, 140 if it is a boy, 160 it is a girl.

Then this symphony of two hearts is what defines the true story of Tom Thumb. The poetry of our forerunner was based upon observation.

All the mothers knew that there was an underground shelter in which very tiny humans smaller than the thumb are living a quasi-miraculous life.

That's the reason why still now an old man like me can speak about Tom Thumb in a court without the people being laughing because they know it is a true story.

Q Dr. LeJeune, what is the effect of an abortion on an eight week human being?

A It kills a member of our species.

* * *

BERNARD NATHANSON, M.D., having been duly sworn according to law, testified as follows:

THE JUDGE: With respect to the speaking and movement in my courtroom, this is a court of law. It looks like someone's den with the fireplace, but it is a court of law.

I expect silence so we can hear the testimony, the direct examination and cross-examination.

All right, you may begin, counsel.

DIRECT EXAMINATION BY MR. TRAYNOR:

Q Doctor Nathanson, please state your full name and your address.

A Bernard N. Nathanson, M.D., 133 East 80th Street, New York City.

Q And, doctor, where are you licensed to practice medicine?

A In New York and Pennsylvania.

Q What is your educational background?

A I was educated at Cornell University. I then went to the McGill University Medical College in Montreal, Canada.

Q What degree did you receive from Cornell University?

A I did not receive a degree. It was pre-medical education.

I received a degree of M.D. at McGill in 1949.

Q And did you do any post-graduate medical training?

A Yes, I did. I had a year as a rotating intern at the Michael Reece Hospital in Chicago, a year as an assistant resident in surgery at the New York Hospital Cornell Medical Center, a year as assistant resident in urology at the New York Hospital Cornell Medical Center; four years of residency in obstetrics and gynecology at the Woman's Hospital in New York City.

That residency was interrupted by two years of service in the U.S. Air Force, during which time I was chief of obstetrics and gynecology in the Northeast Air Command.

And after this rather lengthy period of training and service, I entered the private practice of obstetrics and gynecology in New York City at the end of 1957, substantially older than I was when I started.

Q Doctor, what is your specialty?

A Obstetrics and gynecology.

Q Doctor, do you have a board certification.

A I do.

Q What is that?

A I was certified by the American Board of Obstetrics and

Gynecology in April 1960.

Q Do you have any hospital affiliations?

A I do.

Q And those are?

A I am senior attending obstetrician and gynecologist at the Saint Vincent's Hospital Center which is part of the New York Medical College.

I am senior obstetrician and gynecologist at the St. Luke's Roosevelt Hospital, which is part of Columbia University College of Physicians and Surgeons.

I'm associate attending obstetrician and gynecologist at the New York Hospital Cornell Medical Center.

And I was chief of the obstetrical service at the St. Lukes' Hospital for a period of five, four or five years, from 1973 until the end of 1977.

Q Do you have any professional associations?

A I do.

I am a member of the American Medical Associates, the New York State and County Medical Societies.

I am a fellow of the American College of Surgeons.

I am a fellow of the American College of Obstetricians and

Gynecologists; and a very lengthy list of really quite minor, other organizations.

Q Have you published any writings in your field?

A Yes, I have.

Q Could you give us some of these?

A I published, I believe, 15 or 16 scientific articles, several books, and assorted other material in the area of bio-ethics especially.

Q Have you published in the area of fetal development and embryology and fetology?

A Yes, I have, and I have also lectured on this in respect to my academic appointments.

Q Have you received any awards or honors in your field?

A Well, yes. I have been appointed assistant or clinical assistant professor of obstetrics and gynecology at the Cornell University Medical College which I currently hold.

I also hold a professorship at the New York Medical College where I am clinical associate professor of obstetrics and gynecology.

So I have professorships at two universities.

MR. TRAYNOR: I offer the doctor as expert witness in the field of obstetrics and gynecology.

THE JUDGE: Any objection.

MR. BANGIOLA: No objection.

THE JUDGE: All right, the doctor will be accepted as an expert in obstetrics and gynecology.

You may proceed.

BY MR. TRAYNOR:

Q Doctor, in addition to indicating your training in your chosen field, do you have any training in abortion procedures and any practice, any experience in that practice?

A Yes, I have -- and I say this immodestly, but I probably have more experience in the area of abortion and abortion technology than perhaps anyone in this country, owing to the fact that I was the director of the largest abortion clinic in the United States for a period of two years; and published early on in the medical literature, scientific papers on techniques of abortion, ambulatory abortion technology, complications of abortion, and a whole range of issues dealing with abortion and satellite issues.

Q Thank you, Doctor.

Doctor, would you describe the anatomy of the female

reproductive system?

A Yes. The anatomy proceeds from the vagina which is the lowermost point of the female reproductive system.

The uterus is the key organ. It is a pear-shaped organ which has at its lower end the cervix which resembles most closely, I suppose, a bottle neck.

The uterus itself is the pear-shaped part. It is really a hollow muscle which has a cavity within it.

Emanating from the horns of the uterus on either side are the fallopian tubes which are simply conduits for the egg.

And at the outer limits of the fallopian tubes on either side are the ovaries which are the organs which manufacture or produce the egg which is then subsequently popped out of the ovary, caught by the tube, and if fertilization is to take place it will take place in the tube itself, in the outer portion of the tube, which is called the ampulla.

Q All right, Doctor, what happens upon the occurrence of pregnancy in the human being?

A Well, I will not repeat Dr. LeJeune's very eloquent testimony.

I think you have all heard the conjunction of the sperm and

the egg detailed in rather beautiful detail.

But following the process of fertilization which occurs, as I say, in the ampulla of the tube, the fertilized egg begins to cleave or divide.

And it reaches, it cleaves into two cells and then four, and then eight, then sixteen.

When it reaches the sixteen-cell stage it is called a morula.

And it is at this point, roughly three days following fertilization that the egg proceeds into the uterus where it continues to divide and organize.

And by the sixth day, dividing and organizing, it is now in contact with the lining of the uterus, the endometrium.

Again, division continues. The egg forms now what is called a blastocyst.

That is the moruls now organizes itself into a cluster of cells at one end and a cavity at the other, which is called the blastocyst cavity.

And as it forms a blastocyst, it then comes into contact with the lining of the uterus.

As the organization of the human being continues, there is formed an inner cell mass within this blastocyst which is going to

be the future baby, or is actually the baby.

But it will be organized into a recognizable unborn baby; and an outer layer of cells which is called a trophoblast, which will form the placenta.

At about eight days following fertilization this blastocyst begins to burrow into the lining of the uterus.

And as it burrows, it begins to erode into the maternal blood vessels in the wall of the uterus, and begins to form a nexus with the mother, chemically, and in other ways.

But it is at this point when the circulations begin to interface, the circulations of the unborn baby and the mother, and chemical messengers now can go across that interface into the mother's circulation and vice versa, that we can first pick up the signals that the woman is pregnant, that there is, in fact, an unborn baby within the uterus.

Q At what point are we now in the pregnancy?

A This is about eight or nine days following fertilization.

We can begin to pick up what is called the beta sub unit HCG. I apologize for that.

That is the pregnancy hormone, the pregnancy chemical which we test for with pregnancy tests.

And it is at this point that we can confirm without question that there's a growing, living human being in the maternal uterus.

Q Can you describe the attachment to the uterus and the housing of the newborn human in the womb?

A Yeah, the trophoblast, this outer layer around the blastocyst and the inner cell mass, is an avaricious set of cells.

It goes scouting into the tissues of the uterus for blood vessels. And it has the power to open up maternal blood vessels.

And there is hemorrhage, small hemorrhage around the baby as a result.

From the blood which is surrounding the child now, the child begins to extract certain necessary chemicals, and nutrients, and even oxygen; having now exhausted its own stored-up oxygen and nutrients.

So at this point at eight or nine days, as I say, this nexus, this bridge is established between the unborn baby and the mother.

And the baby begins to extract the nutrients and oxygen from the mother at that point.

Q Is there anything that happens hormonally in the mother at the time of pregnancy, which changes her?

A Yes. Not only is the pregnancy hormone elaborated but through a complex series of interactions the pregnancy hormone acts back on the pituitary gland of the mother, the little gland which is situated at the base of the brain, to inhibit any further changes in the lining of the uterus which would normally develop as the menstrual cycle goes on, were the mother not pregnant.

That process is effectively paralyzed by the hormones which emanate from the fetus.

Similarly, there's an organ formed on the ovary of the pregnant woman called the corpus luteum of pregnancy which elaborates hormones designed to nourish the pregnancy, nourish the unborn baby, supply it with more nutrients and more oxygen.

Q Doctor, what are the stages of growth and development of this new human being in the womb?

A Well, we use words. But one should understand that this is really a seamless continuum.

We use the word zygote which you heard here, I think, from Dr. LeJeune, which is to connote the fertilized egg.

We use terms such as morula, the 16-cell --

Q Would you spell it, please?

A M-o-r-u-l-a. That connotes the 16-cell stage of the

developing human being.

We use the term called embryo which connotes the developing human being from the morulus stage up to about the end of the eighty week following fertilization.

Then we use the term fetus which takes us from the end of the eight week or beginning of the ninth week up to the time that the baby is delivered, whenever that it.

Q Do those words you used change the developing human being in any way?

A No, as I say they are really arbitrary semantic distinctions. But they do not represent anything substantive biologically.

I mean this is, as I say, a seamless continuum and if you insist on putting a label on this human being as it developed, but, well, you can put the labels on but it is really like calling someone a child or an infant or an adolescent or an adult.

I mean it is the same human being simply at a different stage in its development, that's all.

Q Doctor, would you describe the present arsenal of instruments or probes or tools so to speak, of your work, your profession, in treating or in examining and caring for these developing humans?

A Well, yeah, we have I guess starting about 1972 or '73, we began to develop a very sophisticated arsenal of instruments designed to study the development of the human being, in the uterus; and designed also ultimately to diagnose disorders and diseases of that human being; and ultimately to treat that human being.

Those modalities include such things as ultra sound examination. Now the ultra sound instrument is an instrument which has a quartz crystal at its business end.

And the quartz crystal vibrates at an enormously high rate, sending out sound waves at such frequency that we cannot hear them.

Even dogs cannot hear them. No ear can discern these sound waves.

As the sound waves proceed through the pregnant woman's body, or any tissues for that matter, they strike tissue interfaces, interfaces for example, between fluid and solid or between solid and bone, or various other structures.

But each structure in the human body, including the unborn, has a distinct kind of composition which will then yield distinct kind of echoes as that sound wave strikes the interface.

Now as the sound waves strike that interface, they are echoed back. And they are picked up in the same business head of this instrument by a sensor.

And the sensor will then translate these echoes or communicate the echoes back to a computer.

And the computer will recognize the echoes and then assemble the echoes in a certain pattern. And we can see from the pattern of the echoes the picture of the unborn baby.

Now this technology dates back to the 1950s. It is really not all that new.

But in 1976, there was a quantum leap forward in the technology with the establishment or development of what was called real time ultra sound; which, in fact, did not, no longer gave us a static picture of the echoes but allowed us to watch the echoes at play.

In other words, it was really like a motion picture. The echoes were being shown on a screen and changing from moment to moment.

And at this point we began to really hone in on exactly how the fetus or embryo or unborn baby at any stage of its development moves, functions, breathes, urinates, swallows,

everything.

We now had the means at hand to trace that unborn person from literally the very beginnings right through until a change of address called birth.

Now that technology -- by the way, it is now in color. We can now see the flowing of blood through the fetus, through the embryo, in red.

You can actually see the red on the screen as the vessels transmit blood through the fetal circulation.

That technology has allowed us now to proceed into areas which we never could proceed into before.

Q For example?

A Well, for example not only can we now trace the physiology, the normal functioning of this unborn patient, we can now diagnose its illnesses.

We can examine its anatomy. We can watch how it functions. We can actually watch the little valves in the heart as they flop up and down pushing blood through the heart.

And if one of the valves is abnormal you can see it on the ultra sound to correct it by the appropriate surgery.

We have come to the point where not only can we diagnose

the illnesses of this unborn patient from the very beginning, we can also treat it.

We can, for example, diagnose a goiter in this embryo, a swelling of the thyroid gland. And we can now inject thyroid hormone into the uterus and watch the baby swallow the thyroid hormone and cure its own goiter.

I guess the ultimate refinement of this particular technology has come with fetus surgery.

Fetal surgery is being carried out at selected centers across the country here, the most prominent of which is in California, in San Francisco, where Michael Harrison and his group are doing fetal surgery on a regular basis.

And they have published a book on their experiences. This is a medical text book called, "The Unborn Patient" which is written by Harrison, Colbus and Philly.

It was published first last year. A new edition is out. This book details fetal surgery. It is exclusively devoted to fetal surgery.

Q What is actually done in fetal surgery?

A Well, in fetal surgery, and this is done with the aid of ultra sound examination, which makes the diagnosis of the defect or

disease in the child.

The mother is put to sleep. The abdomen of the mother is opened surgically. Then the uterus is opened.

The amniotic fluid is sectioned out. The baby is pulled out of the uterus, the unborn baby still attached by the umbilical cord.

And the unborn baby's abdomen or chest or wherever the defect is, is incised surgically. Then the surgeon will repair whatever defect it is.

If it is a big defect in the diaphragm of the baby so that the intestines are coming up into the chest -- this is called a diaphragmatic hernia, which is a common reason to operate on these babies -- the surgeon will then either suture, sew up the defect or put in a piece of mesh which will bridge the gap in the defect, sew it into place.

Then, having completed the surgery, the incision in the baby is repaired, the baby is replaced into the uterus.

The fluid is then put around the baby and the uterus is sewn up. Then the mother's abdomen is sewn up, and she is allowed then to proceed in the pregnancy to at or near term.

Now it brings up a difficult question. Many people insist that the definition of a human being is when it is born. It is not a

person or human being until it is born.

Now this baby literally was born at this stage of four and five months, during the surgery. It was actually out of the abdomen, out of the mother's body.

So the question is when the baby is put back into the uterus and the uterus is sewn up and the mother goes on to deliver at nine months, is this a born again baby?

Q Doctor, what is fetology?

A Well, fetology is really just a whole science and a very flourishing science, of the development of the unborn baby, its diseases, disorders, surgery.

It has flowered enormously. In fact, it has proliferated beyond imagination in the last 20 years.

I recall that in 1972 I undertook to find out how many papers had been published in the world's literature on the fetus, and I think I counted about 100 at that time, on fetal physiology and anatomy.

Last year at the end of 1989 I went to the Cumulative Index Medicus which is an enormous volume which contains references to every single paper published in the medical literature in the world, in any language.

And I believe I counted some 4,000 articles on the fetus at that time.

(A brief recess was observed.)

BY MR. TRAYNOR:

A When I was in medical school, we used a text book called "Williams", which was in its eighth edition.

"Williams" is like a human being. It has multiple lives, just goes on and on. It's now in its 18th edition.

In that eighth edition which I used in medical school, there were about 30 pages devoted to fetal physiology, to the functioning and the anatomy of the fetus.

In the last edition, the 18th edition published in 1989, about 40 percent of the book is devoted to the fetus.

Of 700 pages about 300 pages are devoted solely to functioning and physiology of the fetus.

So you can see that this is a science which is blossoming and proliferating at an unprecedented rate.

Q What has fetology allowed us to do to study the development of fetology?

A Well, as I indicated we use ultra sound to a great extent. We also use electronic fetal heart monitoring.

This is an apparatus which is placed on the mother's abdomen, and it is a sensor designed to pick up the fetal heart rate moment by moment.

And it is tracked on a moving piece of paper. So it look really like a squiggle across a very long piece of paper or tape.

You can elicit definite reactions from a fetus as reflected in changes in the heart rate. For example, you can plays some Mozart.

I've tried "Eine Kleine Nacht Musik", which it seems to like very well.

MR. BANGIOLA: I stepped out of the room. I guess a missed a little bit. I thought we were taking a break.

THE JUDGE: Your mean the part about Mozart?

MR. BANGIOLA: I just cam back in the room.

THE JUDGE: You didn't miss anything. Basically it's the same question, we are still in the area of fetal surgery and I think the question that -- if you missed any question I'm sorry, Mr. Prosecutor.

MR. BANGIOLA: I stepped f rom the room, your Honor.

MR. TRAYNOR: Judge, I can just re-ask the question. There's only basically one question that I asked and --

THE JUDGE: Ask it again.

BY MR. TRAYNOR:

Q The question was, the development of fetology and what that entails and what it permits the doctor to do.

A I was indicating that we more or less exhausted the subject of ultra sound and we were now on another modality which we use by which we could investigate the fetus, which is electronic fetal heart monitoring.

And it basically tracks the fetal heart rate moment by moment. And as I said you can expose the fetus to a variety of stimuli, ranging from musical ones such as Mozart and you get a certain pattern of the fetal heart rate.

Than if you take Mozart off and you apply heavy metal like Van Halen you will get a jump from the fetal heart rate.

The baby will be let you know that it does or does not like heavy metal.

THE JUDGE: All right, ladies and gentlemen. I want to you refrain laughing all right.

This is not -- this is not -- a stage or play being conducted where at certain moments it is appropriate for the audience to respond to the actors on stage.

This is a court of law. Dr. Nathanson is testifying, and I would like him to be able to testify without any response from the court.

Continue.

BY MR. TRAYNOR:

A So we can elicit certain responses. Again, you can honk an automobile horn and this is frequently used in fetology in the investigation of the fetus, and get another reaction.

So we depend a lot on electronic fetal heart monitoring to refine for us the state of fetal health, and tell us exactly how the baby is doing.

The unborn baby is constantly asking us, really, how am I doing?

And we have to be able to respond to that question with the appropriate tests and investigations, particularly if we fell that the baby is in some way jeopardized.

And these are the two major elements or major modalities we use. We also have chemical tests, to do this, the physical tests I have described.

But mostly we rely on ultra sound and fetal heart monitoring to do our work for us.

Q Doctor, would you describe the functioning of an embryo at eight weeks?

A Yeah, at eight weeks, you have really a recognizable human being.

If you simply held it in your hand, as Dr. LeJeune pointed out earlier, and looked at it, it would be recognizably a person, a human being.

It has a brain which is now formed, although it will continue to develop. And, indeed the brains of little babies, born babies and even young children, continues to develop.

But the brain is there and it is developed and it probably, by the way, is beginning to elaborate a substance called Substance P, which is the chemical messenger for pain.

It has its arms and legs, and even the fingers and toes are now separate and distinct. It has an external ear. It has a nose.

It is, in fact, as I say, quite obviously one of us.

Q What is going on inside of its body in terms of its functions?

A Well, it is really just a miniature person or miniature human being. It is really functioning just the way we function.

It is now beginning to excrete some urine. The heart is

beating and has been beating for at least five weeks.

Circulation is going on. Brain waves have been isolated from eight week babies. The Japanese did this perhaps 30 years ago.

There's really nothing, nothing which we do that that baby doesn't do, except that we do it on a larger scale.

We are larger than life with respect to that baby. But the baby is doing everything as we do.

Q Doctor, is the pre-born baby separate from its mother?

A Yes, it is always a separate person. The circulations are separate. They never mix.

And if they do mix it can be lethal to the baby, or in fact to the mother, too. But, principally to the baby.

We know they are separate human beings from immunological studies.

By that I mean this: The baby is composed, remember, as Dr. LeJeune pointed out, repeatedly, of elements, genetic elements, from both mother and father.

Now it is housed temporarily as a kind of tenant in the mother's body. But it does have paternal genes and paternal

chromosomal substance.

So in effect, it is another person. It is not just the mother.

Now the white blood cells and the immune system of the mother's body or anybody's body, have the ability to recognize and distinguish self from non-self.

And that really is the reason why our white blood cells and our immune systems do not destroy our own kidneys or our own hearts or our own livers; because our white blood cells can recognize self from non-self.

And when there's a foreign substance put into one's body, the white blood cells will recognize it and immediately attack it in an attempt to throw it out, to get rid of it because it is foreign.

It's not self. Now when the pregnancy implants and makes a nexus with the mother's circulation so that chemical messengers are sent to the various systems of the mother, the white blood cells and, in fact, the entire immune system is galvanized because it recognizes that there's something in the mother's body, her body which is non-self.

It is foreign. It is this baby who is a foreign person to the mother.

And a concerted immune attack is focussed on this baby,

the intent being to expel the foreign intruder.

It is recognized, as I say, as non-self. However, over the eons obviously we have, we, meaning all of us who have been unborn babies at some point, we have erected a defense against this attack.

We have what is called the trophoblast, this layer of cells which constitutes our placenta, our after birth.

And that is really a w all, an immunological wall, behind which we can find sanctuary. It stops the attack. And for the most part all of us survive the attack.

Those who do not survive are expelled as spontaneous miscarriages. We call them spontaneous abortions.

Those are the people, the unborn babies who did not survive the attack, they are cast out as non-self, or foreign bodies.

But for the most part we do succeed in repelling this attack and that's the reason why we are all here today.

Q Doctor, it has been stipulated in this trial that an abortion occurred on a pre-born of eight weeks, an eight week embryo of one of the defendants in this trial on September 8, 1990.

Would you tell the Court what happened in the abortion, in

the induced abortion?

A Yes. I think that almost all of us, and I am including not only doctors but everyone, really didn't understand what an abortion did to a baby until in 1984 I set out to document precisely what happened.

And to that end, I commissioned a friend of mine who was working in an abortion clinic, to do his abortions that Saturday under ultra sound, continuous ultra sound observation, and to tape it.

So he did 25 or 30 abortions that day and taped them all, using real time ultra sound on the mother's abdomen.

He put the machinery on the mother's abdomen, had a screen in front of him, and proceeded to do these abortions. And he taped what happened.

Many of these tapes did not come out well. This is a difficult technology at eight weeks, twelve weeks, whatever it was.

But one tape did come out very well. And we subsequently incorporated that tape into a film called, "The Silent Scream."

Now the tape begins by showing the unborn baby moving around in the womb in the amniotic fluid. Any by the way, babies

being to move at eight weeks. That's the first time they start to move.

You can then see the doctor putting the instruments up into the womb to dilate the cervix, the neck of the womb.

And then in the same tape you can see the doctor braking the bag of waters and the water flowing out. And then you see the suction apparatus going up in the uterus.

And you see the baby moving away from the suction apparatus. And then the suction is turned on. This is a father tremendous negative force of suction, runs up to about 60 millimeters of mercury which is a very high suction.

And with that suction as you watch on the ultra sound tape you see the arms and the legs of the baby being torn off and then the body being ripped apart.

Now the head of this baby was too large to suction out. So the doctor had to take a metal instrument called a polyp forceps and reach into the uterus, find the head -- and you can see this really on the ultra sound tape -- put the forceps around the head, and then close the forceps.

So you can actually see the head being crushed on this ultra sound tape. Then the head was removed in pieces.

Now this was all documented on this tape and for the first time we had an accurate reproducible and reliable record of what actually happens during an early abortion.

Q Doctor, assuming that an abortion took place as stipulated in this case and an abortion took place.

What was the effect of that abortion on this baby?

A Well, the effect of the abortion clearly was a) to subject the baby to an unimaginable agony, and b) to end its life in the most barbaric and bloody manner possible.

* * *

BY MULLANEY:

Q Doctor, why did you name the movie "The Silent Scream."

A Well, in one frame of the film, the ultra sound film we could see the mouth of the unborn baby open. It was a dramatic moment, an arresting, in fact a heart stopping moment.

It appeared that the child was grimacing and almost appeared as if he or she wanted to scream. Now clearly you can't scream in the womb. There's no sound.

But it was a silent scream. It was a scream of the most unimaginable agony anyone can envision.

RUSSELL HITTINGER, Ph.D., having been duly sworn according to law, testified as follows:

DIRECT EXAMINATION BY MR. MULLANEY:

Q Can you spell that, Dr. Hittinger?

THE JUDGE: Have a seat, relax before you begin to spell you name.

All right, your full name?

THE WITNESS: Francis Russell Hittinger, last name spelled h-i-t-t-i-n-g-e-r.

BY MR. MULLANEY:

Q Dr. Hittinger, where do you live?

A I live at 21 Jefferson Road, Princeton, New Jersey.

Q Can you tell us a little bit about your education background?

A I received my undergraduate degree at the University of Notre Dame, and my master's and Ph.D. in philosophy from St. Louis University.

Q What was your undergraduate degree in?

A History.

Q What teaching experience do you have, Dr. Hittinger?

A I have been at Fordham University since 1987.

Q I'm sorry, where are you now?

A I am at -- well, I will get up to it. Usually I like to keep the chronology.

Starting at Fordham University in 1987 in the department of philosophy, I taught for one semester as a visiting professor in the department of Medieval and Renaissance studies at NYU.

And for the past two years I have been a visiting professor in the department of Politics at Princeton University.

Q Can you tell us anything about memberships you may have in various academic boards?

A Well, I belong to the two main philosophical associations in this country which are the American Philosophical Association and the American Catholic Philosophical Association.

In both of these I am simply a card carrying member. I am also on the editorial board of the American Journal of Jurisprudence.

Q Can you tell us a little bit about the American Journal of Jurisprudence?

A The American Journal of Jurisprudence is a journal of legal philosophy which is published at the University of Notre Dame.

Q Have you ever published any books specifically?

A I have published two books one of which is entitled, "Linking The Human Life Issues", which has to do with issues of the sort that we are considering today.

And a book on the University of Notre Dame Press entitled, "A critique Of The New Natural Law Theory."

Q Who is the publisher of the Critique -- I'm sorry. Who is the publisher other than the Notre Dame Press?

A The Linking Human Life Issues, Regnery - Gateway.

Q Have you had the opportunity to publish anything other than in book form?

A I have published several scholarly articles. I don't know what the count is exactly, but more than a dozen.

Q More than a dozen?

A Yes. On Oxford University Press, Wake Forest Law Review, Review of Metaphysics; things of this sort.

Q Have you any particular association with the abortion issue or related matters?

A Practically I have no connection to the abortion issue.

Q Okay, I meant professionally.

A Professionally, yes. My expertise in philosophy has to do

with moral philosophy, legal philosophy, political philosophy.

And I do teach this issue as a part of moral philosophy in the various schools that I have taught at.

Q Can you tell us a little bit, exactly what you do currently teach at Princeton?

A At Princeton I teach a course entitled the Politics of Civil Liberties, which is partly constitutional law, basic Bill of Rights, and philosophy of human rights.

MR. MULLANEY: At this point, your Honor, we'd like to ask the Court to recognize Dr. Hittinger as an expert in the field of philosophy.

THE JUDGE: Prosecutor?

MR. BANGIOLA: I do have some voir dire. But before that, Judge, I would like, I have a proffer as to what this witness has to say to the Court.

* * *

DIRECT EXAMINATION CONTINUED BY MR. MULLANEY:

Q Doctor Hittinger, since we seem to be groping for a definition here, what is philosophy?

A Generally speaking, it is a study of conditions for being able to make warranted assertions of truth about various areas: logic,

natural science, government, ethics.

There are different branches of it.

Q Were you present this morning for Dr. LeJeune's testimony?

A Yes, I was.

Q And were you present this morning for Dr. Nathanson's testimony?

A Yes, I was.

Q Did you have the opportunity to hear Dr. LeJeune testify that at all stages of development, the early human being is composed of matter?

A Yes.

Q Did you have the opportunity to hear him testify that it is specific as to its species?

A Yes.

Q And did you have the opportunity to hear him testify that within the species from the moment of conception is, in fact, individual?

A Yes.

Q Did you have an opportunity to hear Dr. Nathanson testify that this species specificity and individuality continues

throughout the course of development?

A Yes.

Q Dr. Hittinger, did you also hear both the doctors conclude that based upon empirical data and based upon the knowledge that the experts bring to this courtroom, that, in fact, what exists at conception and all points thereafter, is, in fact, a human being?

MR. BANGIOLA: Objection.

THE JUDGE: What is the objection?

MR. BANGIOLA: The objection is based upon the hypothetical as presented --

MR. MULLANEY: I'm just asking if he heard it.

THE JUDGE: He's just asking if he heard it. This expert can rely on testimony or the reports of other experts.

MR. BANGIOLA: If the question is limited.

MR. MULLANEY: My question is only did he hear.

THE JUDGE: I understand the questions are being asked as foundation for this doctor's opinions and philosophy.

MR. MULLANEY: That's correct.

THE JUDGE: Go ahead.

BY MR. MULLANEY:

Q Did you happen to hear those conclusions?

A Yes, I have.

Q Could you explain to the Court if and why that conclusion is philosophically correct or philosophically justifiable?

A So far as I know, there's no other way to establish an empirical fact other than the way Dr. LeJeune did so.

That is to say I don't believe that philosophy can be in the business, or any known school of philosophy, can get into the business of establishing the truth of falsehood of an empirical fact.

You obviously don't need a philosopher to come in here and tell you that there's a microphone sitting on the table.

Now definitions of what is human, indeed, definitions of anything, are incapable from a philosophical standpoint of establishing whether the object of that definition exists or not.

So, for instance, it is possible for me to conceive of the definition of something like a church dog, a bulldog that has the face of a Winston Churchill.

I can define what a church dog is and we can debate that definition endlessly.

But the fact of the matter is that no definition is sufficient in itself to establish a matter of empirical fact.

And, therefore, it would be my philosophical opinion that philosophers would have to begin with the facts testified to by Dr. LeJeune.

Q So to summarize is it a fair statement to say that because Drs. LeJeune and Nathanson were dealing with tex facts, that their conclusions are philosophically justified?

A Yes. To ascertain whether or not an entity is human or not, no definition will be sufficient. You're going to have to appeal to observable empirical data and the method of the hard science.

Q But philosophy itself does not offer a definition?

A Philosophy may be able to offer a definition, but offering definitions cannot establish any empirical fact about whether it is or isn't human.

Q Philosophy has to defer to the facts?

A Absolutely.

MR. MULLANEY: Your Honor, I have no more questions. Mr. Traynor will continue with direction examination.

THE WITNESS: Can I just say one more thing in connection with that?

THE JUDGE: What is that?

THE WITNESS: Just I would like to say this: Sure,

philosophy is a very abstract exercise.

But I believe this particular issue that is ascertaining whether or not in fact this is a human being, is not, in the first place, a question for philosophers.

And I believe I can assert that philosophically. I assert it philosophically because no definition can establish an empirical fact.

And, therefore, I think the first thing a philosopher needs to say is that he should get out of the away of that fact finder.

THE JUDGE: All right. Go ahead.

MR. TRAYNOR: Thank you.

DIRECT EXAMINATION BY MR. TRAYNOR:

Q Doctor, what is a person?

A A person is a human being.

Q What is your basis for saying that?

A Ordinarily, in the way we talk, we will tend to pick out under the concept of person, various high grade cognitive activities.

And I think it is fair to say that that is what we usually highlight when we use the term person, the ability to perform memorative functions, calculations, moral reasoning and so forth.

Now I am prepared to admit that there's a distinction to be drawn between certain corporeal or material conditions of the human being, and activities of the human being that are cognitive and so forth.

But distinctions between corporeal and mental activities, do not logically imply two different entities.

Q Give us an example.

A Right now I would assume that you both have a knuckle bone and that you are thinking. But there are not two Dick Traynors.

In other words, it is reasonable to distinguish between corporeal and cognitive functions.

But distinguishing between two things doesn't mean there's two different entities.

It would be a logical fallacy to suppose so. Therefore, there cannot be personhood unless there's first human being-ness.

And that our ability to distinguish certain traits of persons based upon cognitive activities from muscular structure, bones, and so forth, that distinction is always assuming that there is one being, and that one being is precisely the being that Dr. LeJeune testified to this morning.

And I would say the burden of proof as a philosopher, I would say the burden of proof is on the person who would want to contest that.

That is they would have to show that there are personal characteristics somehow not attached to bodies, and that when they draw the distinction between personal characteristics and bodily characteristics they are, in fact, talking about two different entities.

And the burden is on them to show that that is true.

Q Is there a name for that?

A The name for that is dualism.

Q What is dualism?

A Dualism is the position that you have two different and discontinuous entities. For instance, mind and body, soul and body.

You may be able to conceive of the situation from a dualist point of view as something like the relationship between a driver in his car.

So the car belongs to the driver all right, but is not the driver.

It is a very simple sort of way to picture what dualism

would be. So a dualist could argue that tex body is mine, but not me.

Now so far as I understand the debate from all the literature that I have read, at least at the level it is debated at an academic level, is that the material human being is like the car.

It is like a car without a driver. And until the driver shows up, that car can be disposed of without harming a person.

Q Is that what permits abortion in the minds of those who supports that dualism?

A I know of no serious scholar who writes in support of abortion who does not make that argument.

Q What is the, philosophically what is the -- what is the difficulty with dualism?

A The first problem is this: The dualist has no empirical way of showing when the driver shows up. It is a kind of spiritualism.

I mean it is as though some sort of ghost gets into the machine. Now you can entertain such a theory.

But I would venture to say there's no way to cite any evidence in support of it.

Dualism also leads to the problem of infanticide and I think this is widely recognized because the newly born infant is not yet

exercising high grade cognitive activities.

Now since we do generally believe that a newly born baby at least at live birth is a human person, by simple logic it would seem then that a position that wouldn't allow you to regard that as a human person is wrong.

Q Doctor --

A Contradicts what you are already doing and asserting about things.

Q Doctor, let me take you back into the time of the pre-born in the womb when the material presence which Dr. LeJeune talked about was present, as well as Dr. Nathanson.

Is there a time when something is added at a later time to that entity to then add personhood to it?

Is that a credible position?

A Well, I don't believe it is a scientifically or philosophically credible position.

Q Why not?

A You would then have to believe that the entity exists whole and complete in one respect and then from outside of the material world somehow or another a spirit somehow gets infused into it.

This is something that's beyond the range of any kind of

empirical observation, or, I mean this is something you could neither prove nor falsify, it seems to me.

That would be a matter of theology it would seem to me, perhaps.

Q Doctor, what is a potential person?

A The term potency comes from a Latin word, potencia, means power.

And there can be no such thing as a merely potential anything, all right. Because something has to have the power.

Often people confuse the terms possible and potential. Those terms are easily confused semantically in the way we speak.

But to give the term potential any kind of teeth or analytic bite so it means something, I think you have to say potential is power and something has to exist which has the power.

And so on one h and there is nothing wrong philosophically with saying someone is a potential human being.

But they can only be a potential human being, that is have the power to exercise the various traits associated with humanity, if they already are human.

Spermatozoa for instance may be possibly human. But spermatozoa cannot potentially be human.

Left just the way they are they will not ever be able to exercise traits of humanity.

So I would disagree with the coherence, the very coherence of the notion that someone can be merely potential.

Mere potentials can't exist. Something has to have the power.

So I suppose that John McEnroe from the moment of conception had the potencia or power to perform very high level athletic skills, but that being had to exist that has the potencia or the power to do so.

Q Doctor, with respect to human life in the womb, is that actual life or potential life?

A Well, that is actual life. Something has to actually exist to have the power, the potential.

BY MR. MULLANEY:

Q Dr. Hittinger, if you had to use one word to describe the phrase potential life, what would it be?

A It would be a natural being that has power to be exercised.

Q I mean the phrase potential life. What is potential life as a phrase? Is it a contradiction in terms?

A No. If we understand it to mean this: There's an actual life

that has the power to exercise those kinds of activities that are unique and appropriate to that species.

MR. MULLANEY: Thank you. Nothing further.

• • •

MUNICIPAL COURT

Morris County
Morristown, New Jersey

THE STATE OF NEW JERSEY

Plaintiff,

vs.

ALEX VERNON LOCE, et. al.

Defendant

Place: Morristown Municipal Court
110 South Street
Morristown, New Jersey

Date: April 29, 1991

Volume 2 of 2

B E F O R E:

HON. MICHAEL J. NOONAN, J.S.C.

* * *

Now there were certain stipulations that were entered into in this case. The defendants admit and acknowledge as true and

stipulate as finding of fact by the Court to all elements of the offense with the exception of the mens rea requirement as set forth in N.J.S. 2C:18-3(b) which I have already read.

In other words, the defendants stipulated to the fact, number one, that their identity, to their identity as being there on the premises and trespassing. Their presence on the subject premises through fort -- forceful entry as charged. There's a stipulation that they had been given notice adequately as required by statute. In other words notice that they were not supposed to trespass, they disregarded that notice according to the stipulation and forcibly entered the doctor's offices.

And all other proofs are stipulated that may be required by the State in establishing the charge, except mens rea.

So that it's clear, the State has the burden of proving each and every element of every offense beyond a reasonable doubt. The burden is on the State, it never shifts to the defendant. In this case it is stipulated all elements of this offense as I have read it here today, all elements are stipulated by the Defense, except the element of mens rea, or criminal intent. And so, therefore, the State had one element left that was not stipulated to.

The State acknowledges as true and stipulates as findings

of fact by the Court the following facts to be relied on by the defendants in establishing the affirmative defense as offered at trial.

One, and this of course was stipulated between the parties, that on September 8th, 1990 the date of the criminal trespass herein charged an identified young woman who was Mr. Loce's fiance was eight weeks pregnant. That is stipulated to. That Mr. Loce was the biological father of the fetus which was the object of the aforesaid pregnancy, and that on September 8th, 1990 the aforesaid pregnancy was terminated by an act of induced abortion by a medical doctor at the time and place charged by the State as being the time and place of the charged trespass.

That was stipulated to.

At trial Mr. Loce and the other defendants raised the following defenses. Use of force for the protection of other persons, N.J.S. 2C:3-5. Necessity and other justifications, N.J.S. 2C:3-2. Justification and property crimes, N.J.S. 2C:3-10. The right to defend life according to the New Jersey Constitution Article One Section One. And the right as a father to defend progeny, the Fourteenth Amendment U.S. Constitution.

This of course was Mr. Loce's individual offense.

Mr. Loce also raised the defense of use of force of persons with special responsibility, N.J.S. 2C:3-8 based upon his status of the father of the fetus about to be aborted.

Each defense was presented in the context that the fetus aborted at the facility on September 8th, 1990 was in fact a human being. The, the Defense then proffered the testimony of Dr. Jerome LeJeune, an M.D., a Ph.d., a geneticist from the University of Paris who discovered Down Syndrome and its cause. It was proffered by the Defense that Dr. LeJeune would offer expert testimony as to when individual life begins. This testimony was argued was relevant to the defense of all defendants on the issue of mens rea, and in establishing the eight week old fetus as a person pursuant to the statutory defenses previously mentioned herein.

Dr. Bernard Nathanson, expert in obstetrics and gynecology, and Dr. Russell Hittinger, an expert in philosophy where proffered as experts on the issue that the eight week old fetus was a person separate and apart from its mother.

I allowed their testimony. Few rights are more fundamental than that of an accused to present witnesses in his or her own defense, State versus Harold, 183 Super 485 Appellate Division

1982. This right extends to all relevant evidence. Relevant evidence is defined by evidence rule one, section two, N.J.S. 2A:84(a)-3 as evidence having any tendency in reason to prove any material fact.

On the issue of criminal intent, and on the issue of the meaning of what is a person in the context of this case, I allowed their testimony. And thus, the parties focused on the key issue in this case, when does individual life begin.

Dr. LeJeune testified first. He's a professor -- professor of fundamental genetics in the Children's Hospital in Paris. He's a pediatrician and a geneticist. He represented France in the United Nations Scientific Committee on the danger of atomic radiation. He established the first course in human genetics at the California Institute of Technology. He is credited with discovery of the first chromosomal abnormality in man, Down Syndrome. He was awarded the William Allen Memorial Medal in the United States for his work in genetics.

He was specifically asked the question when does human life begin. His answer was very interesting. He said he does not know, and he did not know when human life began, for human life is continuous and that is a question of evolutionary theory.

However, he did have an opinion as to when individual human life began. And he testified that individual human life begins at conception.

Dr. LeJeune explained that nature has invented an extraordinary device to protect the privacy of the very first stage of the human being. He said the right of privacy is written in the following way in biology.

The egg is surrounded by a permeable membrane called zona pellicuda. Once the sperm cell penetrates the egg this membrane becomes impermeable. According to the doctor's testimony this change in permeability occurs in a microsecond. Thus, all other sperm cells are prevented from entering the egg. At this moment the genetic material from the male sperm and the genetic material from the female egg are locked in together. No other genetic material can enter from that point on, according to the doctor's testimony. And all the genetic material is in place at that moment which Dr. LeJeune calls fecundation or conception. According to the doctor's opinion, this is the moment that individual human life begins.

This Court accepts Dr. LeJeune's opinion as true fact, and finds that the individual human life begins at conception.

Now Roe versus Wade concerned the constitutionality of Texas', the state of Texas' criminal abortion statute. The state of Texas argued that life begins at conception. Texas in, in Roe versus Wade, 410 U.S. 113 at page 159, 1973 decision, the Court noted at page 159 Texas urges that apart from the Fourteenth Amendment life begins through conception and is present throughout pregnancy, and that therefore, the state has a compelling interest in protecting that life from and after conception. The United States Supreme Court in Roe versus Wade in 1973 said at page 159, we need not resolve the difficult question of when life begins. When those trained in the respective discipline of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge is not in a position to speculate as to the answer.

That was 1973. This is 1991.

Based upon the undisputed testimony of Dr. LeJeune, those trained in the respective discipline of medicine have arrived at a consensus in 1991, and that consensus is that individual human life begins at conception.

This Court, therefore, makes a finding of fact based upon

Dr. LeJeune's testimony that individual human life begins when the male sperm penetrates the female egg cell. All the genetic material a human being will ever need is locked in the egg at that moment according to Dr. LeJeune's testimony. He testified that there is no disagreement among biologists throughout the entire world that after fecundation no new genetic information enters the egg. At that moment a new individual, a new human constitution begins to live.

In this regard I would like to read Dr. LeJeune's response to two very important questions.

The two questions were, one, when does the individual human life or constitution begins, and two, what is a human being. His response is as follows.

The human constitution -- and this is at page sixty two of the transcript, line eighteen. The human constitution happens at the moment the genetic information coming from the father goes in the cell which is ready to have it, which is the female cell. And once the zona pellicuda has closed entirely, the information is locked in. No one can enter later. And all of it has to be there. To answer your question when does this special constitution begin, it's very simple. At the moment which is microseconds of

the change of the zona pellicuda which now is locking in the particular human constitution which is a new hu -- which is a new being. Now what is a human being? That's very simple. A human being has to be human, has to be a being. Then a human being is only a member of our species, and an egg of a chimpanzee can't be a hu,man being because it is a chimpanzee being. But every time that genetic information is human, every time this message which is at the beginning of life which is alive and which is life, as soon as this message is really a human message, then this life is a human life. And if it is a being, this being is a human being.

Dr. LeJeune also testified the new discoveries and genetic research have created a consensus among biologists and geneticists around the world that not, not only does individual human life begin at conception, but it can be identified as unique individual -- as a unique individual within its own species.

He explained that the Jeffrey D.N.A. identification system which was invented about four years ago allows this to happen. The D.N.A. ribbons which lace the ribbons of the male and female can be read like the bar code system in a super market. The Jeffrey system examines the D.N.A. ribbons within the

chromosomes and can identify and determine a unique D.N.A. code in every individual human being, much like a genetic fingerprint. This empirical data was not available in 1973 when Roe versus Wade was decided.

Additional new scientific and medical discovery since 1973 tested to -- testified to by Dr. Bernar -- Bernar -- Bernard Nathanson include fetal surgery, new ultrasound advances where the fetus can now be observed in an animated fashion within the womb, and some interesting data on the immunization system of the mother and, and its effect during pregnancy.

Again, these discoveries were not available in 1973.

Dr. Nathanson also testified on the fetus being separate and apart from the mother, thus supporting Dr. LeJeune's testimony that at conception two separate individual human beings harmoniously share their lives together. Dr. LeJeune used the human immunization system to prove that the mother and the fetus are two separate human beings.

Page 108 of the transcript, Dr. Nathanson, an expert in obstetrics and gynecology testified that -- well he was asked this question.

Doctor, is the preborn baby separate from his mother.

And his answer was as follows. Yes, it is always a separate person. The circulations are separate. They never mix. And if they do mix it can be lethal to the baby, or in fact to the mother too, but principally to the baby. We know they are separate human beings from immunological studies. By that mean this, the baby is composed as Dr. LeJeune pointed out repeatedly, of elements, genetic elements from both mother and father. Now it is housed separately as a kind of tenant in the mother's body, but it does have paternal genes and paternal chromosomal substance. So in effect it is another person. It is not just the mother. Now the white blood cells and the immune system of the mother's body, or anybody's body have the ability to recognize and distinguish self from non self. And that really is the reason why our white blood cells and out immune systems do not destroy out own kidneys or our own hearts or our own livers. Because our white blood cells can recognize self from non self. And when there is a foreign substance put into one's body, the white blood cells will recognize it and immediately attack it in an attempt to throw it out, to get rid of it because it is foreign. It's not self. Now when that pregnancy implants and makes a nexus with the mother's circulation so that chemical messengers are sent to the

various systems of the mother, the white blood cells, and in fact the entire immune system is galvanized because it recognizes that there is something in the mother's body, her body which is non self. It is foreign. It is this baby who is a foreign person to the mother. And a concerted immune attack is focused on this baby. The intent being to expel the foreign intruder. It is recognized, as I say, as non self. However, over the ions obviously we have, we meaning all of us who have been unborn babies at point, we have erected a defense against this attack. We have erected a defense against this attack. We have what is called the trofoblast (phonetic). This layer of cells which constitutes our placenta, our after birth. And that is really a wall, an immunological wall behind which we can find sanctuary. It stops the attack. And for the most part all of us survive the attack. Those who do not survive are expelled as spontaneous miscarriages. We call them spontaneous abortions. Those are the peep -- the unborn babies who did not survive the attack. They are cast out as non self or foreign bodies. But for the most part we do succeed in repelling this attack, and that's the reason we are all here today.

The person or human being sought to be saved in this case was an eight week old fetus. He referred to it as Tom Thumb

because it measures one inch from head to toes, approximately the size of your thumb. He described it as a tiny human being with fingers and toes, with a face, and with palm prints you could read with a microscope. When asked what effect an abortion would have on an eight week old fetus, Dr. LeJeune said it kills a member of our species.

. . .

I find based upon the undisputed medical and scientific testimony presented before this Court that the eight week old fetus in this case was a living person, a human being, and a unique and individual company of cells.

Roe versus Wade held that the right of personal privacy includes the abortion decision, but that this right to privacy of the mother was not unqualified and must be considered against important state interest in regulation, 410 U.S. at 154.

The United States Supreme Court in Roe also held that for the stage prior to approximately the end of the first trimester the abortion decision and its effectuate -- it's effectuation must be left to the medical judgment of the pregnant woman's attending physician, 410 U.S. at 164.

In this case it has been stipulated that the fetus was eight

weeks old, thus within the first trimester. Here the pregnant woman chose to abort. Her physician was attempting not grant her request to abort when the defendants forcibly entered and trespassed upon the physician's property in an attempt to prevent the abortion.

The prosecutor in his summation drew an analogy to a legal execution pursuant to the capital punishment statute. He said that if someone forcibly entered the jail and trespassed and tried to stop a legal execution of a convicted murderer, then this person would surely be guilty of trespass because the execution was legal according to the law, and thus there would be no justifiable reason under the law to prevent it from occurring, and this person would be guilty of trespassing.

I agree with the prosecutor. A person who trespassed to prevent a legal execution would be guilty of trespass notwithstanding the fact that their defense was to save the convicted murderer's life.

Roe versus Wade was decided eighteen years ago. They had the benefit -- had they had, had they had the benefit of all the scientific discovered over those past eighteen years their decision back then might have been different, but obviously they did not.

In 1973 they chose not to resolve the difficult question of when life begins. Their reasoning at that time was based upon the fact that there was no consensus in the medical and scientific community as to when individual human life began. But times have changed, and perhaps that question should be addressed by the United States Supreme Court today. However, Roe versus Wade is still the law of the land and this Court is bound by it, therefore, I find that the eight week old fetus in this case was a living human being that was legally executed pursuant to the United States Supreme Court's decision in Roe versus Wade, and therefore, there was no justifiable excuse to trespass in this case and attempt to prevent a legal active abortion. All the defendant's herein are held to know the law and are thus bound by it.

In this case all the elements of trespass have been stipulated to except mens rea or criminal intent. I find that the State has proven the element of mens rea beyond a reasonable doubt. The defendants knew exactly what they were doing and they are held to know the status of the prevailing law in this country.

In other words, whether they fully comprehended Roe versus Wade or not, they are bound by it. Their affirmative

defenses fall because the abortion they attempted to prevent was legal under the principle set down in Roe versus Wade. Therefore, for those reasons I find all the named defendants guilty of trespass pursuant to 2C:18-3(b).

Counsel, I'll hear you as to sentencing.

A-202

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MORRIS COUNTY
DOCKET NO. C-

Alex Loce,)

Plaintiff,)

v.)

)

Defendants.)

The Court determined that plaintiff who has filed no papers but having been represented upon which he seeks to enjoin defendant from voluntarily abortion a fetus in a medically acceptable manner, and having further determined that plaintiff and defendant are not married to each other and that plaintiff has merely alleged that he is the father to be, and the court having concluded that alleged prospective fatherhood is insufficient as a matter of law to support the relief sought and further that defendant who is of age has the exclusive right to decide to abort,

IT IS ON THIS 7th day of September 1990;

ORDERED that the complaint be and it is hereby dismissed.

/s/ K.C. Mackenzie
K.C. MACKENZIE, P.J.Ch.

APPELLATE DIVISION:
DOCKET NO.
MOTION NO.
BEFORE PART:
JUDGE (S): ANTELL
MICHELS
KIEFE

ALEX LOCE,

Plaintiff

v.

Defendant

Emergent Application Filed: 9/7/90 By: Plaintiff
Answer(s) filed: By:

Appearance Only: No appearance by Defendant, not having received notice.
Date Submitted to Court:
Date Argued:

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 7th day of September, 1990, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR	GRANTED	DENIED	OTHER
Injunctive Relief		x	

SUPPLEMENTAL:

Plaintiff's application for an order enjoining defendant from submitting to an abortion is denied. Judge McKenzie's order denying relief is therefore affirmed. Judge Keefe dissents from the within determination.

FOR THE COURT:

/s/ William P. Antell

Single Justice Relief denied 9-8-90.
Clifford, J., A.J.S.C.

A-204

SUPREME COURT OF NEW JERSEY
C-229 September Term 1993
37,199

STATE OF NEW JERSEY,	)	
Plaintiff-Respondent,	)	
v.	)	ON PETITION FOR
ALEXANDER LOCE, et al.,	)	CERTIFICATION
Defendants-Petitioners.	)	ENTERED OCTOBER 21, 1993

(AND OTHER RELATED MATTERS)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-934/1233/1258-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the within appeal in this matter is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 19th day of October, 1993.

ORDER entered October 21, 1993.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

Supreme Court, U.S.
FILED
FEB - 3 1994
OFFICE OF THE CLERK

No. 93-1148
No. 93-1149

In the Supreme Court of the United States
October Term, 1993

ALEXANDER LOCE,
Petitioner,
vs.

THE STATE OF NEW JERSEY,
Respondent.

TINA KRAIL, LORI CHADWICK, DEBORAH SMOLDORE AND JEANNIE HENDERSON,
Petitioners,
vs.

THE STATE OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the New Jersey Supreme Court

---

Brief of Respondent in Opposition to Petition for Writ of Certiorari

---

JOSEPH CONNOR, JR.
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QUESTION PRESENTED

Does the federal Constitution prevent a State from punishing criminal conduct simply because that conduct is intended to prevent a lawful abortion?

STATEMENT OF THE CASE

On September 8, 1990, petitioners entered a medical facility in Morristown, N.J., where petitioner Alexander Loce's fiancee was to end her eight-week pregnancy. They bound themselves with handcuffs and bicycle locks to block the operating room.

Petitioners were convicted of criminal trespass, N.J.S.A. 2C:18-3, in the Morristown Municipal Court.[1] (A-186 to

---

[1] N.J.S.A. 2C:18-3b(1) provides:

> A person commits a petty disorderly persons offense if, knowing that he is not licensed

A-201).[2] Their convictions were affirmed by the Law Division and the Appellate Division. (A-82 to A-108). By Order dated October 19, 1993, the New Jersey Supreme Court denied review. (A-204).

SUMMARY OF ARGUMENT

The federal Constitution does not prevent a State from punishing criminal conduct simply because that conduct is intended to prevent a lawful abortion.

> or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> (1) Actual communication to the actor...

[2]A shall refer to petitioner Loce's appendix.

ARGUMENT

PETITIONERS HAVE SHOWN NO SUBSTANTIAL BASIS FOR CERTIORARI.

Petitioners have shown no special and important reason to grant this petition. Therefore, it must be denied. R. 10.1.

This is a criminal-trespass case. It is not an abortion case. It does not involve the issue of when life begins. It does not, as petitioners claim, implicate the equal-protection clause or the due-process clause. Petitioners should not be allowed to twist a simple trespass case into a re-examination of Roe v. Wade, 410 U.S. 113 (1973), reh. den., 410 U.S. 959 (1973).

Petitioners' anti-abortion views do not place them beyond the reach of state criminal law. This is a settled question.

In Bray v. Alexandria Women's Health Clinic, 506 U.S. ___, 113 S.Ct. 753

(1993), this Court noted that the disruption of abortion facilities can be remedied through state criminal law:

> Trespassing upon private property is unlawful in all States, as is, in many States and localities, intentionally obstructing the entrance to private premises. These offenses may be prosecuted criminally under state law, and may also be the basis for state civil damages. (emphasis added)
> Id., at 768.

See also, Wichita v. Tilson, 855 P.2d 911 (Kan. 1993), cert. den., ___ U.S. ___, 114 S.Ct. 468 (1993) (this Court refused to review decision rejecting actor's asserted right to violate state criminal law to prevent abortions).

A woman has a right to a first-trimester abortion. Roe v. Wade, supra. See also, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. ___, 112 S.Ct. 2791 (1992). It defies reason to suggest that an actor may

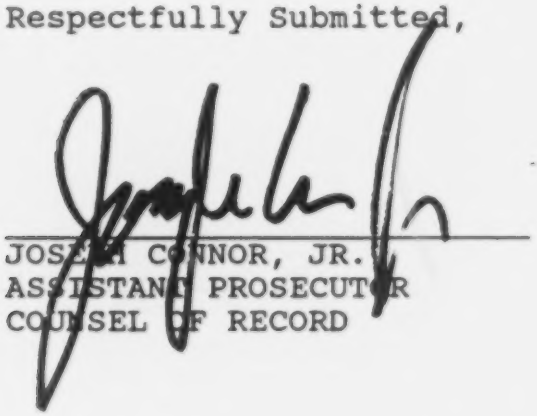
lawfully engage in criminal conduct to prevent the exercise of what has been held to be a woman's right to a first-trimester abortion. This is especially true when the criminal conduct involves a statute unrelated to abortion. To allow activists to challenge long-established precedents by violating a criminal statute unrelated to the issue they seek to raise would be to invite anarchy.

The municipal judge's finding that life begins at conception is dicta. It is irrelevant to the elements of and defenses to criminal trespass. The municipal prosecutor presented no expert testimony. A municipal judge's gratuitous finding, based on such a one-sided record, does not warrant review by this Court. This dicta cannot convert a simple trespass case into a re-examination of Roe v. Wade.

CONCLUSION

Respondent respectfully requests that this petition be denied.

Respectfully Submitted,



JOSEPH CONNOR, JR.
ASSISTANT PROSECUTOR
COUNSEL OF RECORD

Supreme Court, U.S.
FILED
FEB 22 1994
OFFICE OF THE CLERK

No. 93-1148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCE,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER ALEXANDER LOCE'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Under the facts of this case, the conviction of the petitioners is an unconstitutional application of the New Jersey criminal trespass statute. The petitioners were removed, arrested and convicted for asserting their constitutional rights and those of Mr. Loce's child. It is unconstitutional for New Jersey to punish the petitioners for exercising their constitutional rights and protecting the rights of the child. The purpose and effect of New Jersey's action was to protect the mother's "interest" in terminating the life of her child which New Jersey thought was protected by the Fourteenth Amendment and to prevent the petitioners from protecting the child's life and right to live and the rights of the petitioner. The questions pertaining to the humanity of the child, the child's rights, those of the father and whether the mother has a protected interest in killing her child under the Fourteenth Amendment are relevant to the convictions of the petitioner.

ARGUMENT

I. NEW JERSEY'S CLAIM THAT IT IS "IRRELEVANT" THAT THE CHILD IN THIS CASE IS A HUMAN BEING EVIDENCES BOTH A MISINTERPRETATION OF *ROE V. WADE*, AND A MISUNDERSTANDING OF THE PRINCIPALS OF LAW GOVERNING THE

UNCONSTITUTIONAL APPLICATION OF OTHERWISE CONSTITUTIONAL CRIMINAL STATUTES.

The State of New Jersey, in response to the petitions filed in this case, has submitted argument in response, overly simplistic by any standard, which is clearly wrong in its basic conclusion: that the fact the child in this case is a human being bears no relevance to the conviction of the petitioners [Res. Br. p.5]. Although the State avoids discussion of the obvious manner of the relevance of the facts, fails to respond to the arguments in both petitions which address their relevance and is devoid of any authority which truly addresses the principles which would control this case, it appears that the State's argument contains two unsubstantiated propositions: [1] the statute under which the petitioners were prosecuted was not an abortion statute and, as a statute which regulates conduct [criminal trespass] clearly within the State's police power, it's enforcement must always be constitutional [presumably, even in its application to petitioners under the facts of this case] [Res. Br. p.5]; and [2] such facts are otherwise irrelevant to "a women[s]...right to an abortion" [Res. Br. p.4].

A. Under The Facts Of This Case Conviction Of The Petitioners Is An Unconstitutional Application Of An Otherwise Valid

Statute And Constitutes A Deprivation Of The Constitutional And Unalienable Rights Of Mr. Loce's Child And Each Of The Petitioners.

The State of New Jersey argues "irrelevancy" as though the petitioners have attempted to mount a "facial challenge" to a criminal trespass statute. In doing so they urge this court to adopt the legal standard which would only apply to such a challenge: that the statute is constitutional unless there "no set of circumstances exists under which the act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

As a consequence the State has completely failed to address the actual contention of the petitioners: that this *specific application* of the statute (perfectly good on its face) is unconstitutional because, under the facts, it constitutes an unconstitutional infringement of the unalienable and natural rights of the child, and the child's father and the Fourteenth Amendment due process and equal protection rights of both.

The critical factors are that: [1] the enforcement of the statute, under all of the circumstances, did not render the deprivation of the asserted rights "incidental," but the very act of the State, of which the petitioners complain, directly, necessarily, totally, and irre-

versibly destroyed the rights in question; [2] the conduct of the petitioners for which they were prosecuted was essential to protect the life of the child and preserve the rights asserted; [3] the day before his arrest the State denied Mr. Loce access to court to assert those rights by summarily dismissing his civil complaint; [4] the courts convicted the petitioners because they found that the State was compelled to protect the mother's interest in taking the child's life -- the very purpose of the state action being the deprivation of the child's rights asserted; and [5] the State refused to allow defenses, ordinarily recognized by New Jersey in the defense of human beings, because the court ruled that *Roe v. Wade* required the state to permit the child's life to be terminated, regardless of the factual conclusion that the child was a human being. Obviously, the Federal Constitutional issues of the child's rights and whether a mother has a protectible interest in killing her own child are directly implicated.[1]

[1] For the purpose of determining whether petitioners' convictions depend upon the constituional and unalienable rights of the child and the father's rights to defend the child [and this Court's need to address these constitutional issues in this case], the petitioners are in exactly the same position as a father (and those who assisted him) had the child been two years old following birth. If one parent planned to kill a two year old child, and New Jersey first dismissed a civil suit asserting the child's rights and then arrested that parent when he or she went to the place where the child's life was to be taken to prevent the child's death, the prosecution and conviction of that parent would hinge entirely upon the constitutional rights of the

Statutes which are constitutional on their face have been found by this court to be unconstitutional in their applications under a variety of circumstances see, e.g. *Yick Wo v. Hopkins*,[2] 118 U.S. 356 (1885) (a "selective prosecution" of a municipal ordinance); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963) (infringement of free speech); *Wayte v. United States*, 470 U.S. 598 (1985) (infringement of free speech); *C.f. Strouder v. West Virginia,* 10 Otto 303, 100 U.S. 303 (1880). The question of unconstitutional applications of

child and both parents. It would be an obsurd argument under such circumstances to simply point out that a criminal trespass statute, in the abstract, is a valid statute on its face, and pretend that when the state removes the parent, which either purposely or, at least, foreseeably, results in the child's death, that the rights of the child and those of the parent to defend the child are "irrelevant." Thus the real question is whether the child and Mr. Loce possess the rights he claims, or whether the mother in this case had a constitutionally protected interest in terminating the child's life, an interest New Jersey sought to protect.

[2] *Yick Wo v. Hopkins*, perhaps the classical case finding unconstitutional the application of an otherwise constitutional statute, involved the enforcement of a municipal ordinance. Here, the state seems impressed with the fact that petitioners' convictions were originally in a municipal court with only a "trial de novo" in the Superior Court. The implication that an unconstitutional deprivation of an unalienable and fundamental right *must* be countenanced by this court if a state's strategy, in depriving its residences of such rights, includes "light sentences" in order to avoid review, is too plainly meritless to require extended comment. Regardless of the ultimate severity of the penalty imposed, the rights — ones government was created to protect — were totally lost as a result of the government's action. Once a child's life is taken, and all the rights in question completed denied, the unconstitutional character of the state's action in participating in the destruction of those rights does not depend upon the severity of the charge or scope of the punishment later imposed upon a father. Rather, it depends upon the direct and severe infringement of the rights themselves.

statutes often arise in "selective prosecution" cases, and although this case is not of that genre, the underlying principles applicable to those and other cases are even more applicable in this case. For instance, even if there is no infringement of a fundamental right a selective prosecution of an otherwise valid state statute is unconstitutional as applied if the prosecution is motivated by a discriminatory purpose. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Even a showing of discriminatory intent is not necessary if the application involves an overly discriminatory classification. See, *C.f. Strouder v. West Virginia*, 10 Otto 303, 100 U.S. 303 (1880).

However, where the State regulation of conduct limits a fundamental right, there need not be a showing of a discriminatory purpose, if the regulation is more than an "incidental" limit on the fundamental right, but is one which deprives the defendant of those rights. See, *U.S. v. O'Brien*, 391 U.S. 367, 367 (1968); *Wayte v. United States*, 470 U.S. 598, 611 (1985); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). In short, "acts generally lawful may become

unlawful when done to accomplish an unlawful end" or to "attain an unconstitutional result." *Gomillion v. Light Foot*, 364 U.S. 339, 347 (1960) (quoting *Western Union Telegraph v. Foster*, 247 U.S. 105, 114 (1917), and citing *United States v. Reading Co.*, 226 U.S. 324, 357 (1912)).

The underlying, and well established, principle is that "while an individual certainly may be penalized for violating the law, *he just as certainly may not be punished for exercising a protected...constitutional right." United States v. Goodwin* 457 U.S. 368, 372 (1982); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *C.f. Chaffin v. Stynchcomle*, 412 U.S. 17, 32-33, n. 20 (1973). In *Wayte v. United States*, supra, this Court expressed this point in broad terms:

> The decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification", *Bordenkircher v. Hayes*, supra, 434 U.S., at 364,...quoting *Oyler v. Boles*, 368 U.S. 448, 456...(1962), including the exercise of protected statutory and constitutional rights, see *United States v. Goodwin*, supra, 457 U.S., at 372..." *Wayte v. United States*, 470 U.S. at 609.

In the present case all of these policies and principles rendering applications prohibited are present. The lower courts, as well as the Appellate Division, found that the very purpose of the arrest,

removal and prosecution of the petitioners was to allow and achieve the termination of the child's life in order to protect the mother's "liberty interest" under the Fourteenth Amendment. If the "purpose" is impermissible the state action is unconstitutional. see *Shapiro v. Thompson*, 394 U.S. 618, 631. Thus, whether a mother possesses an interest to terminate her own child's life protected by the Fourteenth Amendment is critical. The exact nature of the interest the state seeks to protect by prosecuting the petitioner is pertinent to determine whether the petitioners' rights were merely "incidentally" affected by the state action or impermissibly infringed. One factor is whether the interest the state seeks to advance is an important one. *Wayte v. United States*, supra at 611. Whether the child is a human being whose life a mother has a protected interest in terminating is central to the question of whether the state is advancing a legitimate or "important" interest.

Most importantly is the fact that the child's natural and inalienable rights and those acquired under the due process and equal protection clause are directly involved. By the dismissal of Mr. Loce's civil suit and the arrest, removal and conviction of Mr. Loce and the other petitioners, the limitation of these rights was

not merely "incidental" but, those rights were by necessity, unavoidably, totally and irrevocably denied. Thus, the state's interest advanced by the removal, arrest, and prosecution of petitioners directly, not incidentally, impacted the fundamental rights of the child and petitioners. *Wayte v. United States*, supra at 611. The state interest advanced — the states perceived "duty" to protect a mother's right to kill her child — has as its purpose the destruction and total infringement of the rights advanced by petitioners.

The petitioners were prosecuted and convicted for exercising their constitutional and statutory rights and those of the child. Those rights included their rights to defend the child's life, to defend or assert the child's rights, and their right to assert all of the statutory defenses available to criminal defendants when they attempt to save and defend the lives of other human beings, which New Jersey recognizes in all other instances.

The State's action directly caused the loss of the child's life. Whether the child had rights, therefore, was essential to the determination of whether the prosecution is unconstitutional. Likewise, since the *purpose* of the State's action was to protect the mother's perceived "liberty interest" whether she had such an

interest protectible under the Fourteenth amendment is essential to the question of whether the State could deprive the petitioners of their statutory defenses of necessity. This was the "interest" the State sought to advance. The State refused Mr. Loce access to court and later physically intervened on behalf of the persons seeking to kill the child in order to accommodate the doctor and the child's mother to accomplish their aim. The father's conduct was necessary to save the child's life and his rights and those of the child. The simple fact is that once New Jersey dismissed his civil suit, no matter what form his necessary action took to save the child's life, he was subject to prosecution under some criminal statute as long as New Jersey believed it was obligated to protect the mother's right to terminate the life of the child. It is the statute chosen which is "incidental" to the State's decision to prosecute a father for saving his child's life. The sole reasons New Jersey refused to recognize the defenses raised was its belief that [1] it was not *required to acquit* because this court has never ruled that the child possessed any rights; and [2] the State was not *permitted to acquit* because *Roe* and *Casey* established a woman's "liberty interest" to terminate the child's life.

B. This Court Has Never Ruled That The Actual Humanity Of The Child Is Irrelevant, And Has Never Ruled That The Child Does Not Possess Rights Prior To Birth, Or Whether A Mother's Asserted "Interest" To Kill Her Own Child Constitutes A Liberty Interest Under The Due Process Clause In Light Of The Fact Of The Child's Actual Existence And Interest In Life. Determination Of The Relevance Of The Fact That The Child Is A Complete, Separate, Unique Human Being Is The Precise Issue That Requires This Court To Grant Certiorari In This Case.

The Appellate Division made it clear that the basis for the affirmance of the convictions of the petitioners rests entirely upon two conclusions: [1] New Jersey was precluded from acquitting the petitioners on the basis that the child possessed a right to live under the Fourteenth Amendment because the United States Supreme Court has never made such a ruling; and [2] New Jersey was required to convict petitioners because failure to do so would constitute an infringement of a mother's federally protected interest to terminate her child's life. Both conclusions directly implicate the relevancy of the fact that the child is a complete, separate, unique human being.

1. The Findings Of Fact.

The Appellate Division's opinion and the State Court's findings of fact, concerning the purpose of the petitioners' conduct and the purpose of the state's action renders irrelevant only the precise

statute selected by New Jersey to achieve its true purpose: the protection of what it believed was the constitutionally protected interest of a mother to terminate her child's life. The Courts found that the petitioners, the child's father and four women from whom he obtained help, sought to defend the child's life, and the child's constitutional rights. The Appellate Division unequivocally found that :

> The defendants bound themselves with handcuffs and bicycle locks *in order to block the entrance to the operating rooms.* Loce, who had *previously been denied a restraining order* and the other defendants *sought to prevent the scheduled abortion;* but were ultimately arrested. Subsequently the abortion was performed. [A-84-A-86; emphasis added].

The Law Division in its opinion expressed its findings in these terms:

> All 15 defendants handcuffed themselves together and physically blocked movement within the office with the intent to forcibly prevent the physician from performing the abortion. [A-90-A-91; emphasis added].

The New Jersey Courts also found that the purpose for the arrests was to protect the mother's right to an abortion. The trial judge held that the conviction of petitioner, was required because *Roe v. Wade "legalized the execution of a human being"* [A-200]. The trial court found that the petitioners' actions could not be justified

specifically because of the binding effect of *Roe* and perhaps more importantly, the "execution" of the child was "pursuant" to this courts decision:

> I find that the eight week old fetus in this case *was a living human being that was legally executed pursuant to the United States Supreme Court's decision in Roe v. Wade, and therefore, there was no justifiable excuse to trespass in this case and attempt to prevent a legal active abortion.* [A-200; emphasis added].

It is this conflict of interests --- those of the child in actual life asserted by the petitioners and the assertion by the State of the mother's interest to terminate even the actual life of an existing child --- which directly requires the determination of the relevancy of the fact that the child is a human being.

2. The Legal Conclusions.

The Appellate Division's opinion that the convictions must be affirmed rests upon two distinctly separate, but material legal conclusions. First, the court rejected petitioners' argument that New Jersey was *required to acquit* the petitioners based upon the Fourteenth Amendment because the United States Supreme Court has not yet expressly recognized that the child has constitutional rights [1-87-A-88].

Second, the court held that it was not free to acquit the petitioners on federal [or State] grounds because it *was required to convict* petitioners because the United States Supreme Court has previously held that a woman has a *"right to an abortion"*. The Appellate Division stated:

> The purported rights asserted by defendants, independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighed, are firmly established. *The simple and overriding fact is that each defendant committed [an]...offense in an attempt to prevent a legal and constitutionally protected abortion.* [A-87-A-88; emphasis added].

The Appellate Division found that the *overriding fact* was petitioners attempt to prevent what the court believed was a "constitutionally protected abortion." Whether the child had rights and whether the mother had a "protectible" interest in taking the life of her child are questions necessary to determine if the Court's "overriding" consideration was a valid exercise of New Jersey's police power.

Finally, the Appellate Division held that it need not state whether the fact that the child was a complete, separate and unique human being was relevant or "justiciable." [A-87].

The original conviction was based upon the trial court's

interpretation that this court's opinion in *Roe v. Wade* created the right of "a legal execution" [A-200]. That court indeed found that the execution of the child was "pursuant" to *Roe* [A-200].

There can be no doubt that New Jersey's original conviction of petitioners and their later affirmance directly implicate the constitutional question of the relevance of the fact of the child's actual existence and interest in actual life. That question has never been determined by this court and all of the states are in complete reliance upon this court reaching a determination on this question. Mr. Loce first sought such a determination in a civil suit in his effort to save the life of his child. The fact that it must be determined in a criminal action was not his choice on the one hand and the selection of the method by which the State sought to protect the perceived right of the mother is irrelevant on the other. The issues are directly drawn.

3. The Legal Authorities Cited By The State In Its Response Brief Are Irrelevant To This Case.

The State relies upon three cases to argue that the fact of the child's actual life is irrelevant: *Roe v. Wade, 410 U.S. 113 (1973)*; *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. ___, 112 S.Ct

2791 (1992) and *Wichita v. Tilson*, 855 P.2d 911 (Kan. 1993). They are all irrelevant to the issues presented by this case. *Roe's* irrelevancy is discussed in both the Loce and Krail petitions. *Tilson* simply relies upon *Roe* and, like the New Jersey courts, the *Tilson* court felt required to follow *Roe*. In addition, the standing of the *Tilson* defendants to raise the child's rights was not the same as the father of the child, Mr. Loce or those who assisted him. Further, New Jersey, unlike Kansas, recognized the state statutory defenses of justification and necessity where defense of another human being is involved (see, Loce pet. p. 4). *Casey* simply reaffirmed the limited issues actually decided by *Roe* and did not address the facts or arguments raised in this case. It surely did not rule one way or the other on the legal question of whether the fact that the child is a complete, separate and unique human being is relevant to either (a) the question of the child's rights or (b) a mother's asserted "interest" in killing her own child as protected by the liberty clause of the Fourteenth Amendment.

Obviously, the State court's erroneous belief that the fact that the child in this case was a complete, separate, unique human being was irrelevant to the legal questions is not binding on this court even

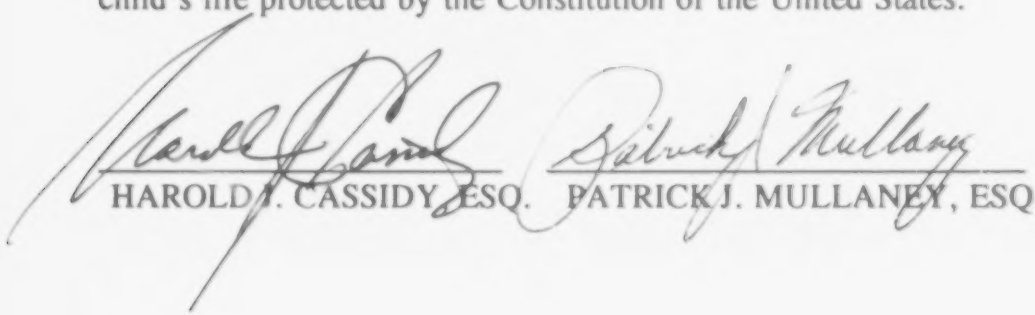
in the absence of findings of fact by the state court. Where a federal issue is involved, this court can make its own findings when the state courts think those facts are irrelevant or immaterial. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945); see e.g., *Merchants National Bank v. Richmond*, 256 U.S. 635 (1920); *Carlson v. Washington*, 234 U.S. 103 (1914). In *Carlson* this court observed:

> "[s]o it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted federal right." see also *United Gas Public Service Co. v. Texas*, 303 U.S. 123 (1937); *Norton Co. v. Department of Revenue of the State of Illinois*, 340 U.S. 534 (1951).

CONCLUSION

The State's argument that the question of the child's actual human existence is irrelevant is contrary to the opinions of this court. This court, never having determined when life begins, has never stated that that question is irrelevant. The *Roe* court, by addressing the question at all, implied the relevance of the inquiry. That court simply held that it could not, at that time in 1973, determine the answer. This court must grant Certiorari to decide this issue and to determine the questions this case presents. This nation, its people, its future children and future generations, as well

as the peoples from the rest of the world who look to it as the guiding inspiration for all human rights everywhere, deserve and require a determination of these issues. This nation cannot endure in its leadership as a nation of laws and human justice under the cloud of the mistaken belief that its highest court has held that it is irrelevant to the administration of constitutional justice that a child is a human being; that this fact is irrelevant to whether the child enjoys the unalienable right to live; and that it is irrelevant in determining whether the child's mother has an interest in taking the child's life protected by the Constitution of the United States.



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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI TO SUPREME COURT OF NEW JERSEY INTERNATIONAL RIGHT TO LIFE FEDERATION, ET ALS.

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INTERNATIONAL RIGHT TO LIFE FEDERATION; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE; ACT RIGHT TO LIFE ASSOCIATION; ACTION LIFE (OTTAWA) INC.; AMERICAN ACADEMY OF MEDICAL ETHICS; ASOCIACION EN DEFENSA DE LA VIDA HUMANA; ASSOCIACAO NACIONAL PRO-VIDA E PRO-FAMILIA; ASSOCIATION FOR TRAINING & EDUCATION IN NATURAL FAMILY PLANNING; CANADIAN PHYSICIANS FOR LIFE; CENTER OF STUDY AND RESEARCH FOR NATURAL FERTILITY REGULATION OF THE CATHOLIC UNIVERSITY OF THE SACRED HEART; CHRISTDEMOKRATEN FUR DAS LEBEN; COLUMBAN SISTERS; DENTISTS FOR LIFE; DEPARTMENT OF GYNECOLOGY & OBSTETRICS OF THE CATHOLIC UNIVERSITY OF THE SACRED HEART; FACULTAD DE MEDICINA DE LA UNIVERSIDAD CATOLICA DE CHILE; FAMILY LIFE SOCIETY; FOUNDATION GENESIS; GRUPO DE INVESTIGACION EN BIOETICA DE GALICIA; HOPE (TEACHING) HEALTH CLINIC FAMILY LIFE AND NATURAL FAMILY LIFE CENTRE; HOSPITAL CHRISTIAN FELLOWSHIP, INC.; INDIAN SOCIETY FOR NATURAL FAMILY PLANNING; INSTITUTE OF MEDICAL ANTHROPOLOGY & BIOETHICS; INSTITUTE ON PUBLIC ISSUES RELATING TO HEALTH CARE AND MEDICINE; LIFE ISSUES INSTITUTE, INC.; LITHUANIAN ASSOCIATION OF WFDRHL; LIVSRETT OG MENNESKEVERD; NATIONAL ASSOCIATION OF OVULATION METHOD INSTRUCTORS; NATIONAL ASSOCIATION OF PRO-LIFE NURSES; NATIONAL COMMISSION ON HUMAN LIFE, REPRODUCTION & RHYTHM; NATIONAL FEDERATION OF CATHOLIC PHYSICIANS' GUILDS; NEDERLANDS ARTSENVERBOND; NORSK PRO VITA; PHARMACISTS FOR LIFE; PHARMACISTS WHO RESPECT HUMAN LIFE (NSW) AUSTRALIA; PHILADELPHIA CATHOLIC PHYSICIANS GUILD; PHILIPPINE ASSOCIATION OF FAMILY PHYSICIANS IN AMERICA; PHYSICIANS FOR LIFE-ALBERTA DIVISION; PRO LIFE FOUNDATION, HUNGARY; PRO LIFE VICTORIA INC.; PROFESSOR DOCTOR G. A. LINDEBOOM INSTITUTE CENTRE FOR MEDICAL ETHICS; RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA; SCIENTISTS FOR LIFE; ST. COLUMBAN'S CLINIC; THE CATHOLIC MEDICAL GUILD OF SINGAPORE; THE DIETRICH BONHOEFFER INTERNATIONAL INSTITUTE FOR BIOETHICAL STUDIES INC.; THE GUILD OF ST. LUKE, S.S. COSMAS & DAMIAN; THE HUMAN LIFE FOUNDATION; THE INTERNATIONAL SOCIETY OF PRENATAL AND PERINATAL PSYCHOLOGY AND MEDICINE; THE MEDICAL EDUCATION TRUST; NEW ZEALAND DOCTORS FOR LIFE; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE-AUSTRALIAN BRANCH; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE-BRITISH SECTION; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE SOUTH AFRICA; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE-UNITED STATES BRANCH; WORLD ORGANIZATION OF THE OVULATION METHOD-BILLINGS.

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INTERESTS OF AMICI

Each amicus curiae in support of the Petitions for Certiorari has an interest in this case because each exists and acts for the purpose of achieving the recognition and protection of all human beings, whether born or unborn. Many amici are medical, scientific or bio-ethical organizations and all have concluded, and new scientific evidence supports the conclusion, that the unborn child prior to birth is a full, complete and separate human being. The amici curiae who appear in support of the Petitions for Certiorari are: INTERNATIONAL RIGHT TO LIFE FEDERATION ["IRTLF"][1]; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE ["WFDRHL"][2];

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[1]IRTLF is an international educational group organized 10 years ago, with its main office in Rome, Italy. IRTLF's main function is to promote education and communication between the various national right to life groups throughout the world. It sponsors two to four international educational congresses annually and has Non-Governmental Organization status in the U.N. and is regularly represented in Geneva, Switzerland on issues pertaining to respect for human life.

[2]This worldwide federation has a membership of 350,000 physicians from 65 nations. It has a constituent membership of 75 groups worldwide. WFDRHL is headquartered in Ostend, Belgium. Its members adhere to the principles that, from the moment of conception, a human being is alive and entirely distinct from the mother who provides nourishment and protection; that each human being is unique and irreplaceable; and that medicine must

ACT RIGHT TO LIFE ASSOCIATION ["ACT"][3]; ACTION LIFE (OTTAWA) INC. ["ALO"][4]; AMERICAN ACADEMY OF MEDICAL ETHICS ["AAME"][5]; ASOCIACION EN DEFENSA DE LA VIDA HUMANA ["ADVH"][6] ASSOCIACAO NACIONAL PRO-VIDA E PRO-FAMILIA ["ANPV"][7]; ASSOCIATION FOR TRAINING & EDUCATION IN NATURAL FAMILY PLANNING ["ATEN"][8]; CANADIAN

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have absolute respect for human life regardless of age, illness, disability or degree of dependence.

[3]ACT is located in Canberra, Australia, and has a membership of 350. It engages in political and educational activities for the protection of human life from conception to natural death.

[4]ALO, formed in 1971 in Ottawa, has 4,000 members and seeks to develop respect for all human life from conception until natural death, through education, publicity and public meetings.

[5]AAME, incorporated in Indiana in 1986, has 22,000 member physicians in all specialties from the U.S. and Canada. It is dedicated to the sanctity and defense of human life from conception until natural death and seeks to return medicine to the original principles of the Hippocratic Oath.

[6]ADVH has 305 members and is located in Seville, Spain. Formed in 1983, its purpose is to oppose abortion in the world and in Spain particularly.

[7]ANPV is headquartered in Brasilia, Brazil and acts to exchange information with similar organizations in Brazil and elsewhere about defending the family and life (from conception).

[8]ATEN is a speakers bureau in Ohio which conducts educational programs in the fields of natural family planning and applied sciences. ATEN believes all human beings are entitled to protection from conception onward.

PHYSICIANS FOR LIFE ["CPL"][9]; CENTER OF STUDY AND RESEARCH FOR NATURAL FERTILITY REGULATION OF THE CATHOLIC UNIVERSITY OF THE SACRED HEART ["CSR"][10]; CHRISTDEMOKRATEN FUR DAS LEBEN ["CDL"][11]; COLUMBAN SISTERS ["CS"][12]; DENTISTS FOR LIFE ["DFL"][13]; DEPARTMENT OF GYNECOLOGY & OBSTETRICS OF THE CATHOLIC UNIVERSITY OF THE SACRED HEART ["DGO"][14];

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[9]CPL, is a Canadian corporation with offices in Ontario, whose membership of about 1,000 physicians from across Canada, believes in the sanctity and defense of human life begining at conception.

[10]CSR, located at the Catholic University of the Sacred Heart in Rome, Italy, works for the defense of human life and to achieve respect for human life beginning at conception.

[11]CDL is an association of politicians, scientists, journalists and educators from throughout Europe who organize discussions and provide political input to achieve the recognition of absolute values, including the inviolability of human life from conception until natural death.

[12]CS, consisting of four members of the Order, and organized in Mokpo, Korea in 1956, works for the marginalized in society to promote the dignity of all human beings.

[13]DFL was organized in 1988 in Pennsylvania to foster the sanctity and defense of human life from conception on and DFL is committed to the application of medical and technological skills in support of this principle.

[14]Located in Rome, Italy, DGO's members (including 38 professional staff, 55 residents and fellows and 40 midwives) provide medical assistance, research and training in gynecology and obstetrics and recognize that the life of the human being begins at conception.

FACULTAD DE MEDICINA DE LA UNIVERSIDAD CATOLICA DE CHILE ["FDM"][15]; FAMILY LIFE SOCIETY ["FLS"][16]; FOUNDATION GENESIS ["FG"][17]; GRUPO DE INVESTIGACION EN BIOETICA DE GALICIA ["GIB"][18]; HOPE (TEACHING) HEALTH CLINIC FAMILY LIFE AND NATURAL FAMILY LIFE CENTRE ["HOPE"][19]; INDIAN SOCIETY FOR NATURAL FAMILY PLANNING ["ISNFP"][20]; INSTITUTE OF

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[15]Located in Santiago, Chile, the bio-ethics unit of FDM was formed in 1988 and consists of nine physicians who teach, research and consult in matters of bio-ethics. FDM is dedicated to defend human life from conception until natural death.

[16]Organized in the Republic of Singapore, FLS acts to promote respect for human life at all stages according to the teachings of the Catholic Church. It counsels those in pregnancy crisis.

[17]FG is located in Sydney, Australia and has 1,000 members who disseminate educational and research materials and conduct seminars and lectures on bioethical issues. Its members are mostly medical, legal and clerical professionals.

[18]GIB's membership of 74 academicians, physicians and judges derives from Galicia, Spain. It studies and distributes information especially regarding the respect and dignity of all humans from conception until natural death.

[19]HOPE, which is located in Jamaica, provides educational and emergency medical and dental services to the poor of the Montego Bay area, including pre-natal and post-natal care.

[20]ISNFP was formed in Madras, India, to teach natural family planning and respect for human life. It is non-denominational and services all.

MEDICAL ANTHROPOLOGY & BIOETHICS ["IMAB"][21]; INSTITUTE ON PUBLIC ISSUES RELATING TO HEALTH CARE AND MEDICINE ["IPI"][22]; LIFE ISSUES INSTITUTE, INC. ["LII"][23]; LITHUANIAN ASSOCIATION OF WFDRHL ["LA"][24]; LIVSRETT OG MENNESKEVERD ["LOM"][25]; NATIONAL ASSOCIATION OF OVULATION METHOD INSTRUCTORS ["NAOMI"][26]; NATIONAL ASSOCIATION OF PRO-LIFE NURSES

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[21]IMAB is an international organization of scientists, located in Vienna, Austria, which performs medical and ethics research and publishes books and articles on bioethics issues.

[22]IPI is headquartered in Hirosaki, Japan and has 316 members, including doctors, nurses, ethicists, journalists and lawyers. It conducts interdisciplinary international studies and discussions on health care problems from the viewpoints of sociology, philosophy and ethics.

[23]LII is an educational foundation whose goals include developing a broad-based national effort to stimulate and guide a renewal of pro-life education throughout the U.S. Its seeks to assure equal protection for all human beings from conception until natural death.

[24]Located in Vilnius, Lithuania, LA consists of 207 mostly physicians seeking to achieve legal protection of human life beginning at conception.

[25]Located in Oslo, this 12,500 member organization seeks to change public opinion on abortion. Its efforts, including publishing and lectures are directed toward schools, universities, churches and society in general.

[26]NAOMI is located in London, England. Its 164 instructors in the United Kingdom and Republic of Ireland train instructors in the Billings Ovulation Method. NAOMI is opposed to abortion and abortifacient methods of family planning.

["NAPLN"][27]; NATIONAL COMMISSION ON HUMAN LIFE, REPRODUCTION & RHYTHM ["NCHL"][28]; NATIONAL FEDERATION OF CATHOLIC PHYSICIANS' GUILDS ["NFCPG"][29]; NEDERLANDS ARTSENVERBOND ["NA"][30]; NORSK PRO VITA ["NPV"][31];

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[27]NAPLN was organized in 1973 and has about 1,000 members from across the U.S. It is dedicated to the sanctity of human life from conception until natural death and works to unite nurses who seek to achieve excellence in nurturing and caring for the unborn, newborn, the ill and dying.

[28]NCHL, a group of 120 physicians and educators, headquartered in Oak Park, Florida, publishes the "Child and Family Quarterly" and educates people on values in human and family life and reproduction.

[29]NFCPG is a federation headquartered in Elm Grove, Wisconsin, comprised of Catholic Physicians Guilds from across the U.S., with a membership of about 6,000 physicians. Among NFCPG's purposes is to provide leadership based on its knowledge, skill and experience in medicine. It believes that scientific evidence today clearly supports the view that the life of the individual begins at conception.

[30]Located in Leiden, The Netherlands, NA is an organization of 800 Dutch physicians who work to inform the public, doctors, the media and Parliament of the personhood of the unborn child and the need to uphold the Hippocratic Oath by protecting the unborn and terminally ill.

[31]The oldest pro-life movement in Norway, NPV's 2,500 members work to protect human life from conception until natural death by the disseminating adequate and thorough information.

PHARMACISTS FOR LIFE ["PFL"][32]; PHARMACISTS WHO RESPECT HUMAN LIFE (NSW) AUSTRALIA ["PWRHL"][33]; PHILADELPHIA CATHOLIC PHYSICIANS GUILD ["PCPG"][34]; PHILIPPINE ASSOCIATION OF FAMILY PHYSICIANS IN AMERICA ["PAFPA"][35]; PHYSICIANS FOR LIFE-ALBERTA DIVISION ["PFLA"][36]; PRO LIFE FOUNDATION, HUNGARY

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[32]PFL was incorporated in Ohio in 1984 and has a membership of more than 1,000 pharmacists and scientists from across the United States and from every continent in the world. PFL supports the sanctity and defense of human life from the moment of conception until natural death.

[33]PWRHL, a group of 135 pharmacists from across Australia, believes that all human life is of equal worth, that it is inviolable and that every born and preborn person has a natural right to life.

[34]PCPG was organized more than 20 years ago in Philadelphia and is the largest Catholic physicians group in the country, with hundreds of members from the Delaware Valley area. It informs and assists the Philadelphia Archdiocese and gives aid and assistance to charitable groups and the homeless.

[35]PAFPA was incorporated in Michigan in 1990. It is comprised of 130 family physicians of Philippine descent from across the U.S. PAFPA promotes the practice of medicine by family physicians and is committed to the principle that human life begins at conception.

[36]PFLA, which is headquartered in Edmonton, Alberta, Canada, supports and promotes conferences and meetings intended to educate physicians and the public so as to achieve respect for human life from conception until natural death.

["PLFH"][37]; PRO LIFE VICTORIA INC. ["PLV"][38]; PROFESSOR DOCTOR G. A. LINDEBOOM INSTITUTE CENTRE FOR MEDICAL ETHICS ["PDGAL"][39]; RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA ["RTLTA"][40]; SCIENTISTS FOR LIFE ["SFL"][41];

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[37]PLFH was organized in Budapest in 1991, to spread scientific information about abortion and euthanasia through the media and lectures and courses for high school and college students. Its president is the Archbishop of Hungary.

[38]PLV is an organization of over 1,000 members in Melbourne, Australia, which acts to uphold and promote the intrinsic value of human life and the rights of unborn children from the time of conception. It sponsors a pregnancy support service and is active politically.

[39]PDGAL is a foundation, located in Ede, The Netherlands, and acts to further Christian medical ethics in health care through teaching, research and writing.

[40]Located in Toronto, Ontario, Canada, this group has 20,000 members who believe that the right to life is the basic human right on which all other rights depend; all human beings share this right before and after birth and society has a duty to protect it. RTLTA performs many educational activities and has a research and resource center that provides information on abortion, euthanasia and other life issues. It also provides counseling for pregnant women in distress.

[41]SFL was incorporated in Ohio in 1991, is comprised of persons with professional degrees in the sciences, including medicine and has a national membership of approximately 150. Its main purpose is to educate people and disseminate scientific information about life issues, including abortion.

ST. COLUMBAN'S CLINIC ["SCC"][42]; THE CATHOLIC MEDICAL GUILD OF SINGAPORE ["CMGS"][43]; THE DIETRICH BONHOEFFER INTERNATIONAL INSTITUTE FOR BIOETHICAL STUDIES INC. ["DBI"][44]; THE GUILD OF ST. LUKE, S.S. COSMAS & DAMIAN ["GSL"][45]; THE HUMAN LIFE FOUNDATION ["HLF"][46]; THE INTERNATIONAL SOCIETY OF

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[42]SCC is located in Chun Chon City, Korea and is comprised of 30 medical professionals, social workers, catechist and missionary religious sisters who provide medical, social and educational services to all peoples. SCC believes that each human being is entitled to recognition and protection beginning from conception.

[43]This group of 270 doctors, dentists, dental surgeons and pharmacists located in Singapore organizes medical seminars and spiritual enrichment programs on pro-life and natural family planning matters.

[44]Located in Adelaide, Australia, DBI promotes the study of human life ethics by providing speakers from its membership of over 300. It makes sub-missions to government and has published booklets on bioethical issues.

[45]GSL is a guild of Catholic doctors, organized in Wellington, New Zealand, which seeks to promote the spiritual and intellectual welfare of Catholic Medical Practitioners, study and discuss medical problems, especially those of a moral, ethical, philosophical and spiritual nature and uphold the moral law in the practice of medicine.

[46]Located in New York City, HLF seeks to promote educational and charitable efforts in relation to the unborn's right to life. It publishes Human Life Review and provides assistance to women to have, and not abort, their children. Ten thou-sand contributors support the foundation.

PRENATAL AND PERINATAL PSYCHOLOGY AND MEDICINE ["ISPPPM"][47]; THE MEDICAL EDUCATION TRUST ["MET"][48]; NEW ZEALAND DOCTORS FOR LIFE ["NZDFL"][49]; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE-AUSTRALIAN BRANCH ["WFDRHLAB"][50]; WORLD FEDERATION OF DOCTORS

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[47]ISPPPM, formed in Vienna in 1971, with its main office in Cracow, Poland, has a worldwide membership comprised of all types of medical specialists and includes educators, anthropologists, ehtnologists, philosophers and social economists. ISPPPM promotes research and education in the field of human development and edits the official journal, The International Journal of Prenatal and Perinatal Psychology and Medicine and organizes a world congress held every three years.

[48]MED is the Liverpool based charity arm of The World Federation of Doctors Who Respect Human Life-British Section (see fn. 53). Its purpose is to identify factors which contribute to the health and well-being of man and to promote research into factors pertaining to the quality of life. Its many publications include those pertaining to the health hazards to the mother of abortion.

[49]NZDFL was organized in 1981 by a group of physicians and aims to: practice and promote ethical medicine as described by the Declaration of Geneva of the World Medical Association 1948; educate the medical profession and society at large regarding professional responsibility towards humanity; further legal protection for all members of the human race, both born and unborn; and promote scientific, social and economic measures to facilitate the practice of ethical medicine.

[50]WFDRHLAB is headquartered in Sydney, Australia and its 500 members, all of whom are medical professionals, conduct seminars, petition legislators and issue press releases about the bio-ethical issues associated with human life as they

WHO RESPECT HUMAN LIFE-BRITISH SECTION ["WFDRHLBS"][51]; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE SOUTH AFRICA ["WFDRHLSA"][52]; WORLD FEDERATION OF DOCTORS WHO RESPECT HUMAN LIFE-UNITED STATES BRANCH ["WFDRHLUS"][53]; WORLD ORGANIZATION OF THE OVULATION METHOD-BILLINGS ["WOOMB"][54].

SUMMARY OF ARGUMENT

A Writ of Certiorari should be granted in this case because the new scientific information obtained in the last ten years leaves no doubt that the unborn child is a

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seek to uphold respect for human life from conception until natural death in terms of the Geneva Declaration of 1947 and the Helsinki Declaration.

[51]Headquartered in Liverpool, WFDRHLBS is a group of 500 physicians from throughout the United Kingdom who witness to the Hippocratic tradition of medicine. It makes submissions to government bodies on ethical issues, including abortion.

[52]WFDRHLSA, which is located in Cape Town, consists of 450 medical professionals who strive to influence and give support to doctors regarding respect for human life at all stages of development until natural death.

[53]Located in Oak Park, Florida, WFDRHLUS works to protect human life from conception until natural death by educational and consultative means. It has a membership of 100 drawn from the entire U.S.

[54]This worldwide organization which was formed in Los Angeles in 1977, has its main office in Kew Vic Australia. WOOMB seeks to strengthen family life and to promote love of the child. In addition to many other activities, WOOMB conducts scientific research into human reproductive technology.

human being from the moment of conception. Scientific technology has revolutionized how mankind obtains knowledge about the unique identity, completeness and development of the child from conception to birth. What science has learned at the molecular level belies many of the assumptions made at the time of *Roe v. Wade*, 410 U.S. 113 (1973): it is now known that children experience pain during surgical abortions as early as eight weeks after conception. Old assumptions about when and how human beings first feel pain no longer apply. New advances require a determination that a child is a human being from conception and that abortion results in the child's painful death.

ARGUMENT

I. THE LIFE OF A CHILD BEGINS AT CONCEPTION. SIGNIFICANT SCIENTIFIC DISCOVERIES SINCE *ROE V. WADE* SUPPORT THIS CONCLUSION. THERE NOW EXISTS A CONSENSUS IN SCIENCE AND MEDICINE ABOUT THE FACTS WHICH FORM THE BASIS FOR THIS CONCLUSION. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHEN LIFE BEGINS AND THE RIGHTS OF THE CHILD.

A. Introduction

Since this Court's decision in *Roe v. Wade*, there has been an explosion in science and technology that has fundamentally altered science's ability to acquire knowledge about human development. Science can now investigate human development at the molecular level using

recombinant DNA technology[55] and monoclonal antibody technology.[56] Today we can learn what is occurring in human development even before we can see specific structures develop.[57] Scientists now look at a human's building blocks, the proteins and instructions that control the proteins, and view what develops, when it develops, at the molecular level. On a macroscopic level, the new technology of ultrasound and its application to the study of the child in utero permits the observation of the child and how he or she reacts to its environment. Advances in

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[55] Watson, J.D.; Tooze, J.; and Kurtz, D.T. *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983.

[56] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985. See also, Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Application of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at 129.

[57] By contrast, in 1973; most knowledge about human identity and development before birth was based on gross morphological observations, whereby a scientist would observe a physical structure such as the cerebral cortex or dendritic spines, and when the structure was not present, observe the result. Today we can learn what is occurring in human development before we see structures develop.

electroencephalography permit the early detection of brain wave activity in the fetus. The results of these advances underscore the ignorance that existed in 1973 concerning the child. We now know that incorrect assumptions were made about: the child's existence as a unique human being from conception; his or her development from conception to old age; and the child's ability to feel pain before birth.

The origin and extensive use of molecular biological techniques since 1973 have dramatically changed the way in which modern biology is conducted. By using DNA probe technology, combined with the southern hybridization technique, for example, scientists are able to detect the presence or absence of a specific genetic code or instruction in a sample of tissue. When DNA probe techniques are combined with polymerase chain reaction (PCR)[58] it is possible to identify the presence of specific genetic code material in a sample as small as

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[58] Arnheim, N.; and Levenson, C.H. 1990. "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J.; Arnheim, N.; and Erlich, H.A. "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N.; White, T.; and Rainey, W. "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174.

one cell[59]. This technology can now determine genetic uniqueness, genetic diseases and permit the observation of human development at the molecular level. This is done by analyzing human genes.

B. The Life of Each Person Begins at Conception.

The life of a human being begins at conception when the sperm of the father penetrates the mother's ovum at which point all of the genetic material and information needed for the complete development of a human being is present. The information carried by the father encounters in the same recipient cell the information transmitted by the mother so that almost instantaneously a new constitution is spelled out in genetic terms and everything that is needed to be a human being is present immediately after conception.[60] If, however, the genetic

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[59] Holding, C.; and Monk, M. "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

[60] Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-*

Disciplinary Approach to the Psychology of Individual Growth. New York: Macmillan Publishing Co., Inc., 1974. "The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximaely 1/175 of an inch and its weight is about one 20 millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242; Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979. "The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52. "Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its own." pp. 52-53. "This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. "Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and

information is insufficient, conception fails and no human being exists.[61] Not only is it

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half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertlization." Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. "The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410. "Genetically the zygote is complete. It represents a new single celled individual." Moore K. *Before We Are Born*, 3rd ed. Philadelphia: WB Saunders Co. 1989. "Human development begins at fertlization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25. The record in this case contains persuasive testimony by Dr. Jerome LeJeune on this and other points. His description of the genetic phenomena is of assistance to the Court in understanding the events and developments on this point (see, LeJeune test., Loce App. at A-115 to A-133; see also, the numerous authorities found following the Loce petition at A-19 to A-30.)

[61] Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584.

possible to identify the first cell following conception as being human, but the individual itself is identifiable.[62] There is no doubt that, immediately after conception, there

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[62] Moore, K. *Before We Are Born*, 3rd ed. Philadelphia W.B. Saunders Company 1989. "Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produce a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26. Turner, J.S.; and Helms, D.B. Lifespan Developmental 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. "Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52 "Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. "You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environment acts to shape the final product from the moment of conception onward."

exists a complete, separate, unique and identifiable human being.[63]

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[63] Moore, *supra*, 26-28; Volpe, *supra*, 18-20. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child*. Homewood, IL: The Dorsey Press, 1977. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982). Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: Tne C.V. Mosby Company, 1974. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of*

The genetic information needed to create a human being is created in DNA.[64] Methylation

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Individual Growth. New York: Macmillan Publishing Co., Inc., 1974. Mader, S.S. *Inquiry into Life*. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979. Pikunas, J. *Human Development: An Emergent Science*. McGraw-Hill, Inc., 1976. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dubuque, Iowa: Wm. C. Brown Company Publishers, 1983.

[64] Petitioners' genetics expert provides a useful description of this information: physically, it is analogous to the ribbon of tape that is used

of cytosine, discovered about five years ago, supports the conclusion that a human being is a complete person at conception. It was discovered that DNA contains basic information, like a program which instructs the specific development of the human being, with the result that some development is programmed to take place immediately and other

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in a tape recorder. Inside the head of a sperm is a long thread one meter or so in length and so tightly coiled in 23 little pieces that its entire volume can be put on the point of a needle. It contains 23 chromosomes; the ovum has the same number. The interaction of the biological components can be analogized to a tape recorder playing music. When a mini cassette, on which the music of an artist is recorded, is played, one experiences the sounds of a symphony. The tape, however, contains no notes or music or musicians. Because of a special code written on the tape, information will be conveyed in such a way that the tape recorder will read it and make air move through a loudspeaker. What is heard by the listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg, which receives the tape band from the father, and which has its own tape band, there forms a sort of table or law of life. Within the egg there exists a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which in the analogy is the mini cassette of the symphony), but the information in the cell itself, which reads it. The cell is analogous to the magnetiscope of the tape recorder and possesses within it enormous information.See, LeJeune test., Loce App. at A-118-119.

development later. Every single stage of growth, although programmed at conception, manifests itself as the program is read.[65] This is a significant new finding that science never anticipated at the time of *Roe*. It removes doubt about the nature and completeness of the human person at conception.

Other developments in technology have resulted in discoveries supporting the conclusion that a human being is genetically complete at the moment of conception.

In 1986, science discovered and developed a technique which can determine the identity of a human being. The technique, known as genetic fingerprinting, extracts DNA, examines it and records the unique traits of the individual.

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[65] Chaillet, J.R.; Vogt, T.F.; Beier, D.R.; and Leder, P. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H.; Barton, S.C.; and Norris, M.L. "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L.; Stewart, T.A.; and Leder, P. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719. Gilbert, S.F. *Developmental Biology* Sunderland, Mass.: Sinaver Associates Inc., 1985, at p. 61. Petitioner provides a helpful development of methylation. See, Loce pet. at 16 to 19.

Genetic fingerprinting establishes the uniqueness and identity of each person from the earliest stages of life after conception.[66]

The technologies of molecular biology have recently begun to be used to detect fetal abnormalities and to determine the fetus' sex by analyzing a very small number of fetal cells that have found their way into the mother's bloodstream (about 1 cell in 10 to 100 million blood cells of the mother).[67]

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[66] Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Journal of Human Genetics, 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications, edited by Jeffreys (1991). Jeffreys, A.J.; Brookfield, J.F.Y; and Semeonoff, R. "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819. Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356. Kovacs, B.W.; Shahbahrami, B.; Medearis, A.L.; and Comings, D.E. "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475.

[67] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow

Using cell sorting technology (another post-*ROE* development) and DNA probe technology, scientists can now determine, for example, the presence of a growing boy or girl from a sample of four milliliters of the mother's blood.[68] It is a fact of human genetics and heredity that a specific person's cells all contain the same DNA composition (except for sperm and ovum cells)[69] so that *the few fetal cells that have found their way into the mother's bloodstream signify the presence of a unique human being existing separately in the mother's womb.*

The ability to detect genetic disorders before birth has improved dramatically during

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Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[68] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cytometry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[69] Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E.; and Okls, S.W. *A Child's World: Infancy Through Adolescence.* New York: McGraw-Hill, Inc., 1979, at p. 51.

the last two decades.[70] The application of DNA techniques to prenatal diagnosis of single gene disorders first occurred in 1976.[71]

Another major advancement has been chorionic villus sampling. It was only in 1982 that its potential for use in determining genetic disorders was realized. Due to the fact that trophoblastic tissue has the same "genetic constitution" as the fetus, a sample from the chorionic villi reflects the chromosomal, biochemical and DNA status of the fetus. Therefore, the production of trophoblastic tissue is controlled by the DNA of the developing child and not by that of the mother. This procedure uses tissue collected in the first trimester of life.[72]

The techniques involved in "in vitro" fertilization demonstrate that the child is a

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[70] Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

[71] Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991).

[72] Hogge, W.A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

unique human being from conception. Before implantation, the new human being is clearly separate from its mother. During the period after fertilization and before implantation, it is possible to determine the sex of the child whose development began apart from both the mother and father.[73] The pre-implantation diagnosis of certain genetic diseases is also considered a feasible medical advance.[74] These procedures support the conclusion that the pre-implanted embryo is a genetically unique and complete human being.

The goals in the study of human embryo viability in synthetic culture medium are improved development and pregnancy success. Recently, an embryo derived platelet activating factor was discovered which, when added to growth media, dramatically increased the developmental potential of the embryo.[75]

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[73] Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. 1989. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348.

[74] Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.

[75] O'Neill, C. "A Consideration of the Factors Which Influence and Control the Viability and Developmental Potential of the Preimplantation

This chemical, produced by the new human, supports the conclusion that, even before implantation, there exists an independent, unique human being able to produce substances that enhance its own chances for survival.

The "fetus" is not "part of" a woman's body. If it were, the mother's body would control the child's genetic growth and development. Using modern molecular biology technology not available in the 1970's, it has been found that, by the third cell division after fertilization, control of growth and development has been established by the new human being's DNA.[76]

In 1981, the Subcommittee on Separation of Powers of the Judiciary Committee of the U.S. Senate conducted extensive hearings on the question of when life begins and, based on the scientific knowledge at that time, the committee concluded:

> Life of a human being begins at conception ... [T]oday the facts are beyond dispute ... physicians, biologists and other scientists argue that conception marks the beginning of

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Embryo." *Baillieres Clin Obstet Gynaecol* 5(1991): 159-178.

[76] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Mammalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

> the life of a human being ... [T]here is overwhelming agreement on this point in countless medical, biological, and scientific writings.[77]

There simply is no credible evidence to refute this conclusion.

II. BASED ON NEW SCIENTIFIC AND MEDICAL INFORMATION IT IS NOW KNOWN THAT A CHILD EXPERIENCES PAIN DURING ABORTION EVEN AS EARLY AS EIGHT WEEKS AFTER CONCEPTION.

Studies conducted using new technology have produced data supporting the conclusion that the unborn child is subjected to great pain during an abortion, and that the child experiences pain as early as eight weeks after conception.

A. The New Technology

Development of techniques of monoclonal antibody production, first described in 1975, using mouse material and then further developed to allow the production of specific human antibodies in the early 1980's[78], has

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[77] Report on Human life Bill, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

[78] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at pp. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62

complemented DNA and RNA studies (which are the subject of molecular biology) by allowing for the specific detection and location of individual proteins or peptides in a human cell sample.

The use of monoclonal antibody technology[79], as well as recent developments in modern protein chemistry and electrophysiology, are being applied to questions relevant to human developmental neurobiology. Initially applied in the mid 1980's, this technique was seen to have the potential to revolutionize the understanding of the human nervous system at its inception. Scientists recognized that with this technology they could investigate nervous system function and development at the molecular or chemical level and were no longer limited to observations of the histological presence of nerves and other gross functionality. From the start, this technological application showed that the classical histo-

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(1984): 109-120, at p. 109.

[79] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

logical and functional criteria for defining (nerve) cell types was oversimplified.[80]

One result was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning of the human nervous system. The presence of peptides (the hormones) of the endocrine system were known in 1973; but since then, similar substances have been found to be present in nerve fibers. This discovery was described in 1985 as revolutionary.[81] The neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue. Two important neuropeptides are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[82] The detection of these two neuropeptides in samples of human tissue has

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[80] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[81] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[82] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body.* Torstar Books, Inc., 1985, at pp. 152-154.

been used to define and locate nervous system development and function in the human being from the time of conception. In 1985, the study of neuropeptides was still in its infancy. Due to the accelerated pace of study, however, it disclosed a very complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. The discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, neither of which techniques were available in the 1970's.

B. Assumptions About Pain.

Since *Roe v. Wade* there have been a number of formerly held assumptions about human neurological development and our ability to feel pain that have since been refuted. The first assumption was that neonates were incapable of feeling pain.[83] The second assumption was that myelinated nerve fibers were necessary for pain perception and that, since they did not form completely until after birth, pain perception was a late developmental event. The third assumption was that pain experience required pain detecting nerves

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[83] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology*, 16(2) p. 549 et seq. (1989).

connected to the thalamus and then to the brain cortex; there was presumed to be a period of cortical maturation necessary before pain could be experienced. All of these assumptions were based on gross histological observations. Those making such assumptions did not know about neuropeptides and they did not have available the modern methodologies and techniques developed in the last decade.

Only recently has it been understood that even neonates feel pain.[84] At the time of *Roe*, it had been assumed by the medical community that a fully developed and mature cortical brain region was necessary for pain perception. This assumption was inconsistent with the observations of those who cared for premature infants,[85] biochemical studies

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[84] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[85] One of whom stated eloquently: "It has generally been assumed that the ability of a child to feel pain increases with age and that neonates may not perceive pain or may perceive it only minimally. Assumed by whom? Certainly not by those of us at the bedside of critically ill infants, who see them flinch from procedures, startle in response to loud noises, and turn from bright lights and various other forms of stimulation. Not by those who have heard infants' anguished cries and seen their vigorous withdrawals from painful stimuli. Not by those who have observed their increased heart and respiratory

supported the observations of care givers concerning pain experiences.

Studies on unborn and premature infants show that pain is experienced much earlier in development than previously thought. Detailed hormonal studies in pre-term neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity, events consistent with stress resulting from pain.[86] It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to the pre-term neonate[87] and to the fetus.[88]

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rates and profuse sweating in response to heel sticks or circumcision. And finally, not by those who have seen babies gasp for every breath as they die from incurable lung disease."
Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347.

[86] Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417.

[87] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431.

C. The Need to Relieve Pain During Fetal Surgery.

Since 1981, the field of fetal surgery has made dramatic advances. It is now common practice during fetal surgery to monitor fetal vital signs and to give the fetus anesthesia.[88] "Although the mother is

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[88] Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176. See Nathanson at 52a.

[89] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Harrison, M.R.; Adzick, N.S.; Longuker, M.T.; Goldberg, J.D.; Rosen, M.A.; Filly, R.H.; Evans, M.I.; and Golbos, M.S. "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at pp. 414-415. Longaker, M.T.; Golbus, M.S.; Filly, R.A.; Rosen, M.A.; Chang, S.W.; and Harrison, M.R. "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Flake, A.W.; Rosen, M.; and Huff, R.W. "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411.

anesthetized for fetal surgery, the fetus becomes the prime target for the anesthesia."[90] "For fetal surgery, unlike maternal surgery, the fetus is not an innocent bystander for whom we attempt the least anesthetic interference. Instead, the fetus is the primary patient, requiring safe administration of anesthesia and close monitoring of anesthetic effects to ensure well being."[91] Studies indicate that performing surgery on unanesthetized fetuses results in automic nervous system stimulation, increased hormonal activity, increased motor activity, and variations in heart rate.[92] Anesthesia is used in fetal surgery on children as young as 18 weeks gestation.[93]

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[90] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. See also, Strickland, supra, at p. 411.

[91] Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[92] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[93] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

D. Non-Myelinated Nerve Fibers Transmit Pain.

Until recently, pain perception was presumed to require myelinated[94] nerve fibers[95] which are present only later in development. It has now been shown that this is not necessarily the case.[96] Both myelinated and non-myelinated nerve fibers transmit pain.[97] Most fibers of the nervous system of a newborn infant are not myelinated until two years after birth when the spinal cord, brainstem, and cerebellum are finally myelinated.[98] Myelin is not needed to conduct impulses over the non-myelinated fibers, although non-myelinated fibers conduct slower than mye-

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[94] Myelin is the fatty substance that makes up the sheath around many nerve fibers.

[95] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body.* Torstar Books, Inc., 1985, at p. 153.

[96] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

[97] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at 1322.

[98] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body.* Torstar Books, Inc. (1985).

linated ones.[99] "Even when mature, most peripheral pain fibers are unmyelinated or, at best, thinly myelinated, lack of myelination therefore cannot be used as a valid argument to deny pain appreciation in the newborn."[100]

E. It is Now Known that Full Cortical Development Is Not Needed for a Child to Experience and Respond to Pain Prior to Birth.

Science no longer accepts that cortical involvement is necessary for pain detection.[101] Evidence to support the premise that pain can be experienced by children before 23 weeks gestation comes from the early detection of pain-associated chemicals; the timing of nerve development; the observation of fetal behavior and the study of full-term infants with anencephaly.

The discovery of neuropeptides and their function as nerve impulse transmitters and

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[99] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body.* Torstar Books, Inc., 1985, p. 109.

[100] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320.

[101] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects." Dev. Pharmacol Ther 15(1990): 142-148, at p. 144. See also discussion at p. 71-73.

modulators was totally unknown at the time of *Roe* and is recognized as revolutionary.[102]

In order to experience pain, there must be an event and the detection of the event outside the brain region. It is a very important recent observation that, using immunohistochemistry techniques, substance "P" positive neurons and nerve fibers were detected at 11 weeks post-fertilization, and enkephalin positive neurons and nerve fibers were detected at 13 weeks post-fertilization. Levels of substance "P" and enkephalin at 12 to 14 weeks were comparable to levels found in the full-term baby. In 1990, as a result of this revelation, researchers have stated that:

> [T]he importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardio-vascular, gastrointestinal and respiratory functions in the human has to be stressed.[103]

None of the significant techniques used in the cited study were available in 1973. Others

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[102] See the discussion of the role of neuropeptides in pain transmission found in the Loce pet. at 21 to 24.

[103] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

have found substance "P" present at five weeks gestation and it has been detected at all stages of development from that point on.[104]

In the last seven years, science has examined the relationship between substance P and pain.[105] It has found that substance "P" (a neuropeptide), an important excitatory transmitter of pain pathways, is clearly present in the human at five weeks post fertilization.[106] Nervous system development and function occur well before 28 weeks gestation.

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[104] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S.; Rizvi, T.A.; and Bijiani, V. "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C.; Charnay, Y.; Chayvialle, J.A.; Daniere, S.; and Dubois, P.M. "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.

[105] Uddman, R.; Edvinsson, L.; Jansen, I.; Stiernholm, P.; Jensen, K.; Olesen, J.; and Sunder, F. "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399.

[106] Luo, C.B.; Zheng, D.R.; Guan, Y.L.; and Yew, D.T. "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

If a neocortex is needed for pain detection, then the fact that neocortex development begins at eight weeks gestation and the fetus has all its neurons by 20 weeks is pertinent.[107] Some may assume that a degree of cortical maturity is necessary for pain perception. That assumption led physicians to assume, at the time *Roe* was decided, that newborns did not feel pain. Clearly, that assumption was wrong.

Until recently, science was incapable of answering questions about the role of chemicals in the transmission of pain. In fact, science had not even discovered the existence of most of the key chemicals at the time *Roe* was decided. Absent knowledge about pain transmitting chemicals, it was thought that a physical structure such as dendritic spines was necessary to "determine" when pain transmission was possible. The presence of pain transmitting chemicals before the presence of such physical structures makes pain transmission possible at an earlier gestational time. A recent review summarized the current state of understanding of the

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[107] Marin-Padilla, M. "Structural Organization of the Human Cerebral Cortex Prior to the Appearance of the Cortical Plate." *Anat Embryol* 166(1983): 21-40, at p. 21.

function and development of the brain in the developing human.[108]

Using modern techniques to identify different types of nerve synapses as well as different types of neurotransmitters in samples taken from 8 to 37 week old fetuses,[109] it was concluded that the morphological substrate for nociception (pain detection) in the spinal cord exists at very early stages of development. As early as the end of the first trimester, the thalamus, third ventricle, midbrain, brain stem and cerebellar hemispheres are developed and their appearances, besides physical size, go unchanged throughout the rest of fetal

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[108] Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen*(1991): "Neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood ...Somatosensory functions are developed at an early stage. The pain threshhold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks." *Id.* at 1880-5.

[109] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

development.[110] Nature in its wisdom prepares the nervous system first so that all other systems can develop and function as they should.[111] This is logical since pain detection and response to pain are important to the human's ability to survive.

It was also recently discovered that many behaviors characteristic of newborns are also

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[110] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison et al., 92-130, Philadelphia: W.B. Saunders Co., 1991, at p. 122. Others have also observed many of the important parts of the puzzle early in development. At seven weeks gestation, cutaneous sensory receptors appear in the fetus. This is preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord. Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. A basic sensory response loop is present very early in human development. It is noteworthy that, with ultrasound, we can observe movement by the fetus away from outside stimulation by the eighth week. Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351. Brain activity, as detected by electroencephalography, is also present at 8 weeks gestation. Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

[111] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life*. St. Louis: The C.V. Mosby Company, 1974, at p. 35.

found in anencephalic children[112] (children born without a developed cortex[113]). Such behaviors were formerly erroneously ascribed to cerebral hemispheric activity.[117]

During their brief post-birth lives[118] these children breath spontaneously and have a grasp response.[119] They respond to noxious stimuli known to cause pain by avoidance, withdrawal and by crying.[120] They breath,

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[112]The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[113]Shewmon, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

[117] *Id.*

[118] Anencephalic children have a post-birth life expectancy of a few hours to a few months.

[119] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[120] Stumpf, D.A., Chair of Medical Task Force on Anencephaly. "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and

cough, hiccup, smile, grimace, yawn and suck.

In a recent study of twelve anencephalic infants, all responded to pain, all had an exaggerated sustained response to touch, all evinced spontaneous movement, and all breathed spontaneously.[121] Additionally, seven of the twelve responded toward stimulation at their mouths (rooting response) and seven had a sucking response.[122] Spontaneous movement in the fetus begins between 6 and 7 1/2 weeks gestation.[123] Stimulation of the mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking is present at 11 weeks gestation.[124] Based on this study, one can conclude that the

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Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[121] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[122] *Id.*

[123] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[124] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

fetus at 6 to 11 weeks gestation is neurologically developed to a point at least equivalent to the twelve anencephalic children described above; in other words, they are all capable of experiencing pain.

The recent biochemical evidence unavailable in 1973, supports the finding that, at very early stages of fetal development, the fetus experiences pain. This evidence is consistent with observed fetal behavior (using real time ultrasound) which shows the fetus moving away from painful stimuli at 8 weeks gestation, the same behavior observed in full-term anencephalic infants. Modern instruments pick up brain wave activity, also at 8 weeks gestation. Together, these observations point to an active sensory system present and functioning in the fetus at 8 weeks gestation, which allows the unborn child to feel pain.

CONCLUSION

There is a scientific consensus, based on recent scientific advances, that a unique human life begins at conception, that pain is experienced as early as eight weeks gestation and that abortion results in the painful death of a unique and irreplaceable human being.

GIL D. MESSINA

Supreme Court, U.S.
FILED
JAN 21 1994
OFFICE OF THE CLERK

No. 93-1148
No. 93-1149

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALEXANDER LOCE,
Petitioner,
- against -
THE STATE OF NEW JERSEY,
Respondent.

TINA KRAIL, ET ALS.,
Petitioners,
- against -
THE STATE OF NEW JERSEY,
Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI TO SUPREME COURT OF NEW JERSEY BY AMERICAN CENTER FOR LAW AND JUSTICE, ET ALS.

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ABORTION'S AFTERMATH; ACCION FAMILIAR; ADEVIDA; ALLIANCE FOR LIFE; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN FAMILY ASSOCIATION, INC.; AMERICAN RIGHTS COALITION, INC.; A.O.C.P.A.; APOSTOLATUS UNITE; AUSTRALIAN FEDERATION OF RIGHT TO LIFE ASSOCIATIONS; BESWICK FAMILY FUND; CAMPAIGN LIFE COALITION; CATHOLIC WOMEN'S LEAGUE OF NEW ZEALAND INCORPORATED; CATHOLICS UNITED FOR THE FAITH, INC.; CENTRO DE INVESTIGACION Y DOCENCIA; CHRISTIAN ACTION RESEARCH & EDUCATION; CHRISTIAN ADVOCATES SERVING EVANGELISM; COALITIONS FOR AMERICA; DELAWARE LAWYERS FOR LIFE; DELAWARE RIGHT TO LIFE; EUROVITA; FAMILLES-UNIES; FAMILY AND YOUTH CONCERN; FAMILY LIFE ASSOCIATION OF CAMEROON; FAMILY LIFE COUNSELLING ASSOCIATION OF KENYA; FAMILY OF THE AMERICAS; FAMILY PROTECTION LOBBY; FEMINISTS FOR LIFE OF AMERICA; FORTRESS INTERNATIONAL; FIDELITY MAGAZINE; FREE SPEECH ADVOCATES; GALWAY FOR LIFE; GROUPEMENT D'ELECTEURS CHRETIENS; GUILD OF CATHOLIC LAWYERS OF NEW YORK, INC.; HANDICAP DIVISION OF THE SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN; HAPPY FAMILY MOVEMENT OF KOREA; HERMANDAD SAN BENITO POR UNA EUROPA CHRISTIANA; HOLT CHILDREN'S SERVICES; HOSPITAL CHRISTIAN FELLOWSHIP, INC.; HUMAN LIFE FOUNDATION OF NEW ZEALAND; HUMAN LIFE INTERNATIONAL SOUTH AFRICA; INSTITUTE FOR PREGNANCY LOSS; INSTITUTO DE CIENCIAS FAMILIARES; JAPAN PRO-LIFE MOVEMENT; JEUNES POUR LA VIE/JUNGEREN VOOR HET LEVEN; JURISTEN-VEREINIGUNG LEBENSRECHT e.V.; JURISTENVERENIGING PRO VITA; JOVENES POR EL DERECHO A LA VIDA-ECUADOR; KNIGHTS OF THE SOUTHERN CROSS; LA TREVE DE DIEU; LEGAL ACTION FOR WOMEN; LIFE; LIFE AFTER ASSAULT LEAGUE; NATIONAL COUNCIL OF CATHOLIC WOMEN; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES; NATIONAL ORGANIZATION OF EPISCOPALIANS FOR LIFE; NATIVITAS A.S.B.L.; NEW JERSEY RIGHT TO LIFE COMMITTEE, INC.; NEW ZEALAND SOCIETY FOR THE PROTECTION OF THE UNBORN CHILD INCORPORATED; O.U. STUDENTS FOR LIFE; OPEN ARMS; POLISH UNION OF PEOPLE WHO RESPECT HUMAN LIFE; PREGNANCY COUNSELLING SERVICES INCORPORATED; PRO-LIFE ACTION LEAGUE; PROFESSIONAL WOMEN'S NETWORK; PRO-LIFE PHILIPPINES; PRO-LIFE SOUTH AFRICA; PRO-VITA-GEZIN EN LEVEN; PRO-VITA SIBIU ASSOCIATION; RIGHT TO LIFE ASSOCIATION (NEW SOUTH WALES) INC.; RIGHT TO LIFE LEAGUE OF SOUTHERN CALIFORNIA; ROCKLAND COUNTY CATHOLIC COALITION; SCOTTISH ASSOCIATION FOR NATURAL FAMLY PLANNING; SERVICE AND RESEARCH FOUNDATION OF ASIA ON FAMILY AND CULTURE; SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN; SOCIETY OF ST. VINCENT DE PAUL IN NEW ZEALAND; SOUTHERN DOMINICAN PREACHERS; ST. JOSEPH'S WORKERS FOR LIFE & FAMILY; STICHTING SCHREEM OM LEVEN; STRASBOURG CONVERSATION CIRCLE; THE COUPLE TO COUPLE LEAGUE OF BELGIUM VZW; THE COUPLE TO COUPLE LEAGUE FOR THE CZECH & SLOVAK REPUBLICS; THE EPISCOPAL SYNOD OF AMERICA; VICTIMS OF ABORTION NEW ZEALAND INCORPORATED; VICTIMS OF CHOICE; WOMEN AFFIRMING LIFE; WOMEN FOR FAITH AND FAMILY; WOMEN FOR LIFE (N.Z.), INC.; WOMEN FOR WOMEN; WORLD ORGANIZATION FOR THE FAMILY,

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INTERESTS OF AMICI

Each amicus curiae hereinafter named in support of the Petitions for Certiorari has an interest in this case because each is an organization which exists and acts for the purpose of achieving the legal recognition and protection of all human beings, whether born or unborn, and by actively seeking to end legalized abortion and the so-called "right to abortion". These amici represent literally millions of people from around the world. Their experiences with the tragic effects of abortion on, not only the immediate victims -- the children -- but upon women, fathers, siblings, the family and society generally, lend a most valuable perspective to the arguments to be presented that might otherwise be lost.

The amici curiae who appear in support of the Petitions for Certiorari are: ABORTION'S AFTERMATH ["AA"][1]; ACCION FAMILIAR ["AF"][2]; ADEVIDA[3]; ALLIANCE FOR LIFE

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[1]AA was founded in 1989 to provide networking support for post-abortion women in New Jersey. This Edison-based organization has ties with over 50 post-abortion support organizations in New Jersey, which in turn have contact with about 5,000 women per year.

[2]AF is an unincorporated association that was formed in 1979 in Spain in order to help the family with all aspects of problems facing the family today, including, in areas related to legal and moral issues. Its main office is located in Madrid. AF believes that the family is the root of all health and sickness in

["AFL"][4]; AMERICAN CENTER FOR LAW AND JUSTICE ["ACLJ"][5]; AMERICAN FAMILY ASSOCIATION,

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society. AF promotes family values and supports the position that life cannot be taken by anyone from the moment of conception until natural death.

[3]Organized in Madrid, Spain in 1979, Adevida provides financial, medical and human support to pregnant women in difficulties. It publishes a pro-life statement daily in the Spanish press which is signed by approximately 1,350 university professors and teachers. Its members participate annually in the March for Life.

[4]AFL was formed in Canada in 1972 and its main office is located in Winnipeg, Manitoba. Its purposes include educating Canadians on matters of human development, human experimentation, reproductive technologies, adoption, abortion, chastity, euthanasia and similar issues. AFL provides educational services and materials for its member groups to educate Canadians and provides counseling and referral services to the public with respect to unforeseen pregnancies and post-abortion trauma. AFL coordinates 250 educational pro-life groups throughout Canada.

[5]ACLJ is a national public interest law firm, chartered to enter the legal arena on issues of broad public interest. ACLJ has members in all fifty states. Attorneys from every state of the Union have affiliated with ACLJ to assist in the restoration of pro-liberty, pro-life and pro-family values.

INC. ["AFA"][6]; AMERICAN RIGHTS COALITION, INC. ["ARC"][7]; A.O.C.P.A.[8]; APOSTOLATUS UNITE ["AU"][9];

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[6]AFA is a corporation organized in 1977 with offices in Tupelo, Mississippi. AFA's local chapters are active in seeking to preserve the lives of unborn children and the physical and emotional health of their mothers. AFA has approximately 600 local citizen chapters throughout the U.S. which are active in seeking to preserve community integrity through the implementation of public decency laws. It has a subscribers list of more than 885,000 individuals and churches for its monthly newsletter, AFA Journal.

[7]ARC was incorporated in Tennessee in 1987. ARC assists women with the physical and emotional problems resulting from abortion by referring women to medical, emotional and legal providers for assistance, including bringing malpractice claims against those who injure them through abortions.

[8]Organized in 1982 in Paris, France and 13,000 members strong, A.O.C.P.A. is a pro-life organization engaged in judicial and financial actions against abortion. Its purpose is to mobilize the public to oppose abortion by taking legal action, demonstrating and lobbying members of Parliament.

[9]AU was organized in 1986 and incorporated in Maryland in 1988. It has its offices in Woodstock, Virginia. AU is a Catholic lay organization which has as its purpose to bring people to Jesus Christ to experience the Holy Eucharist through the Holy Mother of the Church, in

AUSTRALIAN FEDERATION OF RIGHT TO LIFE ASSOCIATIONS ["ARTL"][10]; BESWICK FAMILY FUND ["BFF"][11]; CAMPAIGN LIFE COALITION ["CLC"][12]; CATHOLIC WOMEN'S LEAGUE OF NEW ZEALAND

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union with the Holy Father. AU organizes Rosary Congresses which consist of one to seven day prayer gatherings featuring Eucharistic adoration, Marian devotion and sound church teaching. A Global Week of Prayer is conducted annually in 88 countries, with over 11 million participants, during which participants pray and fast to end abortion.

[10]ARTL was formed in Sydney in 1980 and has 30,000 members today. Its objects are to foster cooperation between member associations and to act as a national voice on all national matters regarding the protection and enjoyment of human beings of their right to life.

[11]BFF was formed in Sydney, Australia in 1967. It has 18 members, all of whom are members of the Beswick Family. BFF operates to support public charitable purposes and good works by personal and financial effort, including the protection of unborn human life.

[12]CLC is the pro-life national political organization in Canada. CLC engages in lobbying, counselling of pregnant women in distress and seeks to achieve the enactment of laws which will protect all human beings from the moment of conception until natural death.

INCORPORATED ["CWLNZ"][13]; CATHOLICS UNITED FOR THE FAITH, INC. ["CUFF"][14]; CENTRO DE INVESTIGACION Y DOCENCIA ["CDIYD"][15]; CHRISTIAN ACTION RESEARCH & EDUCATION ["CARE"][16]; CHRISTIAN ADVOCATES SERVING EVANGELISM ["CASE"][17]; COALITIONS FOR

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[13]CWLNZ was established in 1931 in New Zealand and has about 5,000 members. CWLNZ is based in each of the six dioceses of New Zealand. CWLNZ's objects are to unite Catholic women in New Zealand in Christian fellowship in order to enhance the growth of their spiritual, intellectual, family and social life, and to foster mission and charitable works and social action. It is actively opposed to abortion and supports the protection and sanctity of human life from conception until natural death.

[14]Organized in New Rochelle, New York in 1968, CUFF strives to advance and defend the teachings of the Catholic Church, including as to the sanctity of all human life. Its membership of 16,000 derives from throughout the world.

[15]CDIYD is dedicated to the promotion of natural family planning and defense of human life.

[16]CARE is headquartered in London, England and seeks through its 100,000 members to promote Biblical and Christian action so as to support the integrity of the family, centrality of marriage and the sanctity of human life from conception.

[17]CASE is a legal defense organization dedicated to protecting, preserving and defending the right to proclaim the Gospel

AMERICA ["CFA"][18]; DELAWARE LAWYERS FOR LIFE ["DLL"][19]; DELAWARE RIGHT TO LIFE ["DRL"][20];

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of Jesus Christ in public places. CASE is particularly concerned by a disturbing tendency to undermine both cherished First Amendment freedoms and the fundamental right to life in the name of a judge-created "right" to abortion.

[18]CFA was incorporated in 1977 and is headquarted in Washington, D.C. CFA is a grass-roots organizing and lobbying organization that coordinates activities amongst about 100 organizations nationwide in areas related to social issues, defense and foreign policy, legal and judicial matters, political reform and economic issues. CFA takes a pro-life position on the abortion issue.

[19]DLL is an unincorporated, non-denominational association of Delaware lawyers which was formed approximately two years ago. DLL has a membership of more than 30 Delaware lawyers. The organization is involved in the representation and counseling of primarily single women who are clients of Birthright crisis pregnancy centers. DLL's members respect and defend the sanctity of human life from the moment of conception.

[20]DRL is a Delaware corporation with headquarters in Newark, Delaware. The corporation was formed in 1973 in order to educate people regarding issues of life, abortion and euthanasia. DRL supports respect for human life from fertilization until natural death. DRL has approximately 1,250 dues paying members, with about twice that number on its

EUROVITA[21]; FAMILLES-UNIES ["FU"][22]; FAMILY AND YOUTH CONCERN ["FYC"][23]; FAMILY LIFE ASSOCIATION OF CAMEROON ["FLAC"][24]FAMILY LIFE COUNSELLING

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newsletter mailing list.

[21]Located in Paris, France, Eurovita provides a platform for pan-European pro-life groups in which information and resources are shared to defend the unborn child.

[22]Headquartered in Brussels, Belgium, FU publishes a periodical, runs a library and conducts meetings and youth camps, all with the purpose of promoting the family and human life. Its 1,200 members come from Belgium, France, Germany, Denmark and Switzerland.

[23]FYC was established in 1971 in the United Kingdom and currently has a membership of approximately 25,000 people. FYC, headquartered in Milton Keynes, England and having three branches in the United Kingdom, is concerned with, and has acted as a focus for, the welfare of the family and the issue of abortion which is necessarily an important part of the overall concern for the family.

[24]FLAC was organized in the Kumbo Diocese of Cameroon in 1982. Its membership of more than 500 couples, parents and youth are active in pro-life activities, including, teaching natural fertility regulation, anti-abortion activities, chastity education and other pro-family activities.

ASSOCIATION OF KENYA ["FLC"][25]; FAMILY OF THE AMERICAS ["FOA"][26]; FAMILY PROTECTION LOBBY ["FPL"][27]; FEMINISTS FOR LIFE OF AMERICA ["FFLA"][28];

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[25]FLC is headquartered in Nairobi, Kenya and has a membership of 440. FLC is active in opposition to abortion and provides education on natural family planning, the care and protection of human life from conception and prevention of HIV infection.

[26]FOA was incorporated in 1977 in Missouri. This organization, whose office is in Dunkirk, Maryland, provides educational services to women and families on matters of natural family planning and teaches parents to enable them to remain the primary educators of their children regarding human sexuality. FOA's educational materials have been translated into more than 22 languages and those who work in its programs are drawn from throughout the world.

[27]FPL is an unincorporated association which was formed in Maryland in 1980. The purpose of FPL is to lobby the state legislature on behalf of evangelical churches in Maryland and to represent its membership on Judaeo-Christian issues, including in support of the position that human life begins at conception. FPL has 3,000 active members.

[28]FFLA is a Wisconsin corporation which was formed in 1973 and which actively seeks to continue to promote and expand over a century of effort by feminists toward achieving the goal of a society in which women are empowered to

FORTRESS INTERNATIONAL ["FI"][29]; FIDELITY MAGAZINE ["FM"][30]; FREE SPEECH ADVOCATES ["FSA"][31]; GALWAY FOR LIFE ["GFL"][32]; GROUPEMENT D'ELECTEURS

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make life-affirming decisions for themselves and their children. Headquartered in Kansas City, Missouri, FFLA has a total membership of approximately 5,000 nationwide with 47 affiliated chapters throughout the continental United States. FFLA actively opposes societal pressures, direct and indirect, which compel, coerce or create pressure on a woman to abort her child.

[29]FI is an Illinois corporation formed in 1989 and consisting of 500 members. FI assists women who become pregnant as a result of rape or incest as well as assisting the children conceived as a result of such acts.

[30]FM, located Indiana, explicates family, moral and sexual issues from a Catholic perspective. It takes the pro-life position regarding human life.

[31]FSA is a legal defense project that exists to secure the First Amendment rights to engage in religious witness, peaceful sidewalk counseling, and protest of, or conscientious objection, to the destruction of unborn human life. FSA endeavors to assure a proper and competent defense, due process, and all constitutional rights to those who take a stand against abortion.

[32]Located in Galway, Ireland, GFL distributes information and letters to politicians, newspapers, radio and

CHRETIENS ["GDC"][33]; GUILD OF CATHOLIC LAWYERS OF NEW YORK, INC. ["GCLNY"][34]; HANDICAP DIVISION OF THE SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN ["HDSPUC"][35]; HAPPY FAMILY MOVEMENT OF KOREA ["HFM"][36]; HERMANDAD SAN BENITO POR UNA

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television demanding a referendum in support of the rights of the unborn. It has 120 members drawn from Galway County.

[33]Comprised of Belgians who study politics and disseminate information, GDC assists voters in their choice of political representatives who will respect the moral principles of Christian civilization, including principles relating to the rights of the unborn.

[34]GCLNY, consisting of 300 lawyers from the Archdiocese of New York, provides spiritual and ethical guidance to its members and believes that the lives of all persons, beginning at conception, are entitled to legal protections.

[35]All of the 650 members of HDSPUC are either disabled, or they are the parents of, or care-givers to, disabled persons. Their purpose is to campaign to secure the right to life of all disabled persons from the moment of conception until natural death. HDSPUC is headquartered in London.

[36]HFM runs 80 "old folks homes," 5 homes for unwed mothers and has provided guidance in natural family planning to more than 500,000 couples throughout the Republic of Korea. Its members number 2,000 and they endeavor to protect the family and all human life beginning from

EUROPA CHRISTIANA ["HSB"][37]; HOLT CHILDREN'S SERVICES ["HCS"][38]; HUMAN LIFE FOUNDATION OF NEW ZEALAND ["HLF"][39]; HOSPITAL CHRISTIAN FELLOWSHIP, INC. ["HCF"][40]; HUMAN LIFE INTERNATIONAL SOUTH

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conception.

[37]HSB, which is located in Madrid, Spain, has a membership of 260 and strives to insure that the emerging unity of Europe consists of mores and institutions consistent with the doctrine of the Catholic Church, including that relating to the protection of human life.

[38]Incorporated in Korea in 1977, HCI is a Christian, non-profit organization which strives to help every homeless child to have a family. HCI reunites children with birth families or with adoptive families and provides for the welfare of handicapped children and unwed mothers.

[39]HLF was formed in Auckland, New Zealand in 1984 and incorporated in 1985 under the Charitable Trusts Act of 1957. HLF's objects are to promote the saving and protection of human life throughout its whole course from the moment of conception until natural death, with a view to the moral, ethical and mental advancement of the public in order to educate the public as to the need for respecting human life at every stage of its development.

[40]HCF is headquartered in California and has 5,000 members from throughout the United States HCF conducts conferences, seminars, etc., to, among other things,

AFRICA ["HLSA"][41]; INSTITUTE FOR PREGNANCY LOSS ["IFPL"][42]; INSTITUTO DE CIENCIAS FAMILIARES ["ICF"][43]; JAPAN PRO-LIFE MOVEMENT ["JPM"][44]; JEUNES POUR LA

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educate health professionals on ethical issues.

[41]HLSA is located in Cape Town and strives to uphold the sanctity of human life beginning from conception and to strengthen and preserve Christian family values. Its membership is comprised of Christian professional persons.

[42]IFPL was founded in 1990 as an independent non-profit corporation. It is an education, research and treatment center dedicated to the study of the impact of human pregnancy loss, including induced abortion. IFPL is particularly interested in the examination and remediation of traumatic abortion and adoption experiences, both of which are volitional in nature.

[43]ICF was organized in 1952 Uruguay. ICF's primary purpose is to foster natural family planning. In fulfilling its purpose, it operates doctors' consulting rooms and trains instructors and conducts courses in sexual education and family counseling. It publishes the Family Digest and gives talks on television and radio and conducts a four year university course in the education of Family Social Workers. The organization, operates in Uruguay, Argentina, Paraguay and Brazil.

[44]Located in Kochi City, Japan, JPM educates society, through its newsletter, videos and literature, that life begins at

VIE/JUNGEREN VOOR HET LEVEN ["JPVL"][45]; JURISTEN-VEREINIGUNG LEBENSRECHT e.V. ["JVL"][46]; JURISTENVERENIGING PRO VITA ["JPV"][47]; JOVENES POR EL DERECHO A LA VIDA-ECUADOR ["JPD"][48]; KNIGHTS OF

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conception and man does not have the right to destroy it. Its general membership of over 50,000 comes from throughout Japan.

[45]JPVL, is located in Brussels, Belgium and has a membership of 7,368 drawn from Belgium and France. It seeks, by publishing, conducting meetings and supporting women in distress, to further esteem for human life and the person at each stage of growth, beginning with conception and ending with natural death.

[46]This group of 900 German and other European lawyers conducts an annual congress, lobbies and supports scientific and legal research especially as regards the rights of the unborn.

[47]Located in the Hague, JPV publishes a quarterly, "Pro Vita Etc.", engages in letter writing to newspapers and members of Parliament and brings lawsuits to prevent state subsidization of abortion, all for the purpose of protecting human life from conception. JPV is comprised of about 400 barristers, professors, judges, mayors and members of Parliament.

[48]JPD, organized in Quito, Ecuador, is an organization that educates youth to respect life by conducting lectures, conferences and movies at schools, universities and public offices.

THE SOUTHERN CROSS ["KOSC"][49]; LA TREVE DE DIEU ["LTD"][50]; LEGAL ACTION FOR WOMEN ["LAW"][51]; LIFE[52];

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[49]KOSC is an unincorporated association formed in 1923 in Auckland, New Zealand and now headquartered in Wellington. It is an association of Catholic laymen active in the lay apostolate and having over 500 members in 16 branches throughout New Zealand. KOSC is currently engaged in pro-life issues, speaking out against the increasing number of abortions in New Zealand and opposing the pro-euthanasia lobby. Membership in KOSC is broadly based and includes lawyers, doctors and other professionals.

[50]Located in Puteaux, France and having about 5,000 members, LTD strives to protect the helpless, including pre-borns, handicapped, the infirmed and opposes eugenics, racism and the death penalty. It supports "workers of peace" (rescuers, conscientious objectors to abortion) and denounces abortion as a crime against humanity. It actively opposes the abortion pill, RU-486.

[51]LAW was incorporated in Florida in 1988 to assist women who have been physically injured by abortion by making medical malpractice claims against clinics and doctors because of such injuries. LAW refers women for legal assistance and assembles a data base of the country's most notorious abortionists. LAW operates in all 50 states.

[52]A national registered charity in Warwickshire, England, LIFE has a membership of 32,000 from all of the U.K., Ireland, Gibraltor and elsewhere. By its

LIFE AFTER ASSAULT LEAGUE ["LAAL"][53]; NATIONAL COUNCIL OF CATHOLIC WOMEN ["NCCW"][54]; NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES

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activities which include counseling, care and housing for homeless and unsupported mothers before and after birth, LIFE seeks to uphold the utmost respect for human life from fertilization and to protect the mother and child from abortion.

[53]LAAL is a pro-life organization located in Appleton, Wisconsin with a membership of over 8,000. It offers prayer and encouragement to sexually abused adults and children and victim to victim counseling.

[54]NCCW was established in 1920 and is headquartered in Washington, D.C. It federates 8,000 Catholic women's organizations in the U.S., which include national organizations such as Catholic Daughters of the Americas (150,000 members), Daughters of Isabella (100,000 members) and Ladies of Charity (35,000 members). There are 123 diocesan councils which are members of NCCW as well as 6,690 parish organizations. In total, NCCW represents between 800,000 and 1,000,000 women nationwide. NCCW addresses issues of concern in areas related to church, family, community and legislation, including questions surrounding abortion and the taking of the life of a child without justification.

["NIFLA"][55]; NATIONAL ORGANIZATION OF EPISCOPALIANS FOR LIFE ["NOEL"][56]; NATIVITAS A.S.B.L.[57]; NEW JERSEY RIGHT TO LIFE COMMITTEE, INC.

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[55]NIFLA was incorporated in April 1993. It is headquartered in Manassas, Virginia and advises, counsels and gives legal assistance in matters of public interest law, particularly to pro-life crisis pregnancy centers throughout the United States, of which there are approximately 3,000. NIFLA trains and provides legal assistance to crisis pregnancy centers to enable them to support women in crisis so that they might carry their babies to term.

[56]NOEL, which was organized in 1966 and has offices in Fairfax, Virginia, has a national membership of 20,000 in 189 chapters in all 50 states. NOEL promotes the biblical view of the sanctity of human life at every stage of development and attempts, through education, publications and assisting pregnant women, children and the terminally ill, to influence the Church and culture to embrace this view.

[57]This unique group of 1,500 friends in Brussels, Belgium seeks to instill the joy of Christmas through the year. Its activities include providing help to religious artists, helping those who are poorly educated to enjoy art, helping generally the poor of Brussels and providing special help, before and after birth, to pregnant women to avoid abortion. The groups consists of all religions, the only requirement being that a member have spirit of charity.

["NJRTL"][58]; NEW ZEALAND SOCIETY FOR THE PROTECTION OF THE UNBORN CHILD INCORPORATED ["NZS"][59]; O.U. STUDENTS FOR LIFE ["OU"][60]; OPEN ARMS

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[58]NJRTL is headquartered in Cranford, New Jersey. Comprised of 70,000 families as members, it is the largest pro-life organization in New Jersey. NJRTL is dedicated to protecting human life from the moment of conception until natural death. It engages in educational, legislative and grass-roots efforts and assists women in crisis pregnancies.

[59]Incorporated in New Zealand in 1970, NZS has its national office in Wellington. NZS has more than 28,000 active supporters from throughout the country and is divided into 70 branches. The objects of NZS are to uphold and promote the intrinsic value of human life and to uphold and protect the rights of unborn children from the time of conception. NZS cooperates with government departments, other groups and persons engaged in fostering respect for human life, and in promoting social conditions which will provide the best opportunities for mothers and children. Members come from all walks of life and ages from throughout New Zealand.

[60]OU is a group of 100 peaceful, positive, hard-working students from Oklahoma University endeavor to educate the university community about all stages of fetal development, the effects of abortion and alternatives to abortion.

["OA"][61]; POLISH UNION OF PEOPLE WHO RESPECT HUMAN LIFE ["PUP"][62]; PREGNANCY COUNSELLING SERVICES INCORPORATED ["PCSI"][63]; PRO-LIFE ACTION

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[61]OA is an international Christian ministry that was incorporated in the Washington State in 1986. Located in Columbia, Missouri, OA has chapters throughout the United States and in other countries. OA is dedicated to bringing hope and healing to anyone suffering from abortion's aftermath. OA is made up primarily of people who have personally experienced the tragedy of abortion and its devastating after-effects.

[62]Organized in Warsaw in 1991, PUP engages in activities throughout Poland in an effort to restore legal protections for all human life, beginning at conception and to promote the dignity of all human life and and the human family.

[63]PCSI is a charitable trust incorporated under the laws of New Zealand. Its principal office is located in Auckland, New Zealand and it has 24 branches throughout that country. PCSI is involved in counseling women distressed by pregnancy and those suffering from post-abortion stress. Post-abortion stress stems from the guilt and grief associated with the knowledge that the woman has killed her child. PCSI counsels some 5,000 women annually.

LEAGUE ["PLAL"][64]; PROFESSIONAL WOMEN'S NETWORK ["PWN"][65]; PRO-LIFE PHILIPPINES ["PLP"][66]; PRO-LIFE SOUTH AFRICA ["PLSA"][67]; PRO-VITA-GEZIM EM LEVEM

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[64]PLAL was formed in Illinois in 1980, where it continues to have its main office. PLAL is a pioneer in pro-life activism. It uses every media opportunity to get the pro-life message out and to bring the focus of public attention back to the unborn child. Although PLAL has no actual membership, it has newsletter subscribers and supporters numbering between 8 and 10,000. PLAL's supporters are drawn from throughout the U.S., Canada, Australia, Ireland and Africa.

[65]PWN represents women from a variety of professional and business fields who recognize the sanctity of all human life. PWN members are lawyers, accountants, consultants, teachers, realtors, professors and systems analysts. It has a membership of between 4,000 and 4,500 which is active in pro-life activities. PWN is considered to be the voice of pro-life professional women.

[66]Incorporated in Manila, PLP is a national educational body coordinating pro-life groups and providing instruction concerning life issues. Its 1,200 members and 10,000 cooperating associates are comprised of Catholics, Protestants and Muslims from all walks of life.

[67]PLSA was organized in Cape Town in 1977 to protect human life from conception to natural death by lobbying legislators, demonstrating, publishing newsletters and audio-visual presentations. This group

["PVG"][68]; PRO-VITA SIBIU ASSOCIATION ["PVS"][69]; RIGHT TO LIFE ASSOCIATION (NEW SOUTH WALES) INC. ["RTLA"][70]; RIGHT TO LIFE LEAGUE OF SOUTHERN CALIFORNIA ["RTLLSC"][71]; ROCKLAND COUNTY

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consists of 43,600 members drawn from all religions, races, ages and walks of life.

[68]Located in Mechelem, Belgium, PVG provides help to pregnant mothers in distress and conducts information campaigns in an effort to promote the protection of human life from the moment of conception.

[69]The purpose of PVS is to make Romanian society aware of the full humanity of the unborn child from the moment of conception, to promote the rights of the unborn in accordance with Christian ethics and human rights, and to fight against abortion and abortion laws. The office for this 150 member organization is in Sibiu, Romania.

[70]Headquartered in Sydney, Australia, RTLA has a membership of about 8,000 drawn from the State of New South Wales. RTLA engages in political lobbying, legal actions and educational and counseling activities intended to promote concern for the human rights of the unborn, newborn handicapped and the aged and infirm.

[71]RTLLSC is a California corporation, with offices in Pasadena, California. Its purposes are twofold: to provide education and service. RTLLSC's education department handles several hundred speaking requests per year and the league

CATHOLIC COALITION ["RCC"][72]; SCOTTISH ASSOCIATION FOR NATURAL FAMLY PLANNING ["SANFP"][73]; SERVICE AND RESEARCH FOUNDATION OF ASIA ON FAMILY AND

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holds an annual educational conference with nearly 500 attendees. Its Collegians for Life has clubs on 30 campuses throughout California. In addition, RTLLSC operates 13 Pregnancy Counseling Centers, three medical clinics and four education chapters. RTLLSC has a membership of about 50,000 families drawn mainly from Southern California. In 1992 alone, RTLLSC counseled more than 20,000 women facing unplanned pregnancies.

[72]This unincorporated association was organized in Rockland County, New York in 1990. RCC is a grass-roots organization seeking to educate, inform and speak out on issues supporting Catholic teachings. RCC has approximately 750 members and a mailing list of 4,000. RCC members meet with representatives of school boards and publicizes its positions by communicating with the media and provides a speaking panel to various organizations. RCC takes a position in support of the belief that human life begins at conception and human life is entitled to protection and respect from that point in time until natural death.

[73]Organized in Glasgow, Scotland 1979, SANFP is dedicated to teaching fertility awareness in schools, colleges and to groups of teachers, nurses, doctors, and seminarians to enable couples to responsibly plan their families.

CULTURE ["SARFA"][74]; SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN ["SPUC"][75]; SOCIETY OF ST. VINCENT DE PAUL IN NEW ZEALAND ["SSV"][76]; SOUTHERN

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[74]SARFA is an organization dedicated to going beyond welfare measures for the well-being of women by promoting natural family planning.

[75]SPUC, an unincorporated English association established in 1966, SPUC has 50,000 paying members and 300 local groups throughout the United Kingdom. In addition to its headquarters in London, SPUC has full-time offices in Glasgow, Belfast, Cardiff, Preston, Stockton, Barrow and South London. SPUC was formed to fight the passage of the bill to legalize abortion which was introduced in Parliament. Since its inception, its role has been two-fold: educational and political. As its name implies, its prime concern is to win legal protection for the unborn child from the moment of conception until birth and so most of its work is concerned with spreading and extending knowledge of the humanity of the human person before birth and demonstrating that abortion represents the most fundamental abuse of human rights. SPUC is regarded both inside and outside Parliament as the foremost political body fighting against abortion and euthanasia.

[76]Originally formed in France in 1833, SSV was incorporated in New Zealand in 1883. SSV is an international charitable organization whose members practice Christianity by helping those in need on a person-to-person basis. Although Catholic in origin and character, SSV is open to

DOMINICAN PREACHERS ["SDP"][77]; ST. JOSEPH'S WORKERS FOR LIFE & FAMILY ["StJW"][78]; STICHTING SCHREEW OM LEVEN ["SSOL"][79] STRASBOURG CONVERSATION CIRCLE ["SCC"][80]; THE COUPLE TO

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all who wish to live their faith by loving their neighbors in the person of the needy and by helping people regardless of race, color or creed. SSV has approximately 2,500 members (New Zealand's total population is only 3.5 million) drawn from throughout New Zealand.

[77]This group of five itinerant, Roman Catholic priests from Irving, Texas preach the gospel of Jesus Christ. They are pro-life.

[78]Located in Ottawa, Ontario, Canada, StJW has more than 2,500 members who, by their writings, conferences, lectures, interviews and availability to parents, seek to save the unborn, promote the family and save youth from destructive sex education.

[79]Formed in 1985 in Hilversum, Holland, SSOL has about 120,000 members who publish, issue press releases, conduct press conferences, demonstrate outside abortion clinics, give lectures and petition government to apply God's truth and His love to the issues of life.

[80]SCC is a group given to inviting pre-eminent scholars and intellectuals to lecture at its discussion circle. This group, drawn from all segments of society have one common belief: in the existence of given values, independent of the times

COUPLE LEAGUE OF BELGIUM VZW. ["CCLB"][81] THE COUPLE TO COUPLE LEAGUE FOR THE CZECH & SLOVAK REPUBLICS ["CCLCS"][82]; THE EPISCOPAL SUNOD OF AMERICA ["ESA"][83]; VICTIMS OF ABORTION NEW ZEALAND INCORPORATED ["VOA"][84]; VICTIMS OF CHOICE

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and society, which once neglected, have driven human beings into barbarism. One such value is the regard for the absolute holiness and inviolability of human life from conception until natural death. The patron of the SCC is His Imperial Highness, Dr. Otto von Habsburg, member of the European Parliament.

[81]CCLB is located in Rotselaar, Belgium and teaches natural family planning and promotes pro-life, pro-chastity and pro-family values in schools. Its 1,700 members are from Belgium and The Netherlands.

[82]Located inKladno, The Czech Republic, CCLCS teaches natural family planning and chastity and is opposed to abortion.

[83]Located in Ft. Worth, Texas, ESA, through its national membership of more than 18,000, seeks to uphold and extend traditional Christian teaching on theology and moral behavior within the Episcopal Church including as to the sanctity of human life, beginning at conception.

[84]VOA was founded in 1989 and incorporated in New Zealand in 1991. VOA is headquartered in Wellington, New Zealand and has nine branches each of which are staffed by a coordinator and

["VOC"][85]; WOMEN AFFIRMING LIFE ["WAL"][86]; WOMEN FOR FAITH AND FAMILY ["WFF"][87]; WOMEN FOR LIFE

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counselors. VOA is a post-abortion counseling organization for victims of abortion, including women, men, and children of women who have had abortions.

[85]VOC was incorporated about 10 years ago in California. VOC provides education, information and counseling to women, primarily those suffering from post-abortion syndrome. VOC's executive director travels throughout the United States to train counselors who then counsel women and educate the public on issues arising out of post-abortion syndrome. VOC publishes a manual and produces articles and pamphlets for a readership of between 2 and 3,000, and conducts workshops, conferences and seminars throughout the world.

[86]WAL was founded in 1990 and has its principal office in Boston, Massachusetts. Its membership of between 700 and 1,000 is drawn from 42 states. WAL's purpose is to voice the commitment of Catholic women in support of women and the dignity of life and motherhood and to serve as a national organization of Catholic women committed to upholding the sanctity of each human life from conception to natural death. WAL seeks to offer a public witness by women in defense of the unborn and unwanted through personal commitment, educational efforts, prayer and home and professional life.

[87]WFF, which has its main office in St. Louis, Missouri, was incorporated in 1984. WFF is a Catholic women's

(N.Z.), INC. ["WFL"][88]; WOMEN FOR WOMEN ["WFW"][89];

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organization which educates people on issues important to Catholics including those related to the family and is intended to aid women in their efforts to continually deepen their understanding of the Catholic faith. WFF is an organization committed to pro-life principles from conception to natural death.

[88]WFL is a New Zealand corporation, having been formed in 1978. Its national office is located in Auckland, New Zealand. WFL defends the rights of the unborn child from conception and supports the right to life of all persons until natural death. WFL supports and encourages women in their role as mothers, recognizing the major contributions made by them in their child-rearing and home-making roles. WFL has a membership numbering 2,000, which is drawn from many areas of New Zealand.

[89]WFW is a corporation that was formed in Indiana in 1987 to protect and foster respect for the sanctity of human life from the moment of conception until natural death. WFW upholds the Virgin Mary as a role model for women and recognizes the equality of men and women, while acknowledging their differences so as to promote the dignity and value of womanhood. WFW's membership derives from all denominations from 28 states, Canada, India and the Philippines.

WORLD ORGANIZATION FOR THE FAMILY ["WOFF"][90].

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case because the Court, in *Roe v. Wade*, 410 U.S. 113 (1973), declined to decide the most important issues presented by the instant petitions: when does the life of the child begin and, if the child is a human being prior to birth, does the child have constitutional rights?

The question of when the child's life begins was intentionally left to future courts because of the *Roe* Court's concern about the inadequacy of "man's knowledge" in 1973. This question is now before the Court in the first instance and the only criterion for its determination is the correctness of the Court's decision. Stare decisis principles (which might apply if *Roe* had attempted to resolve the inquiry) do not apply here. Thus, it is the Court's duty to resolve these questions because it is now clear that they can be resolved.

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[90]WOFF is dedicated to helping parents to remain primary educators of their children. The organization is a strong defender of human life from the moment of conception and they promote the natural method of family planning.

The Court has never considered the legal significance of the fact that the unborn child is a human being who experiences pain. No acceptance of *Roe* is possible until the Court does so.

In that a child is a human being prior to birth, none of the concerns of the Court as expressed in *Roe* (such as reliance and workability) are principles that preclude a decision which recognizes the child's right to live; a result different than that reached in *Roe*. Such a determination would demonstrate that *Roe*, in reality, is gravely at odds with the principles that protect the most basic of human rights: the welfare of children, even their very existence.

Until these central issues are addressed and the Court can state with conviction that all of the issues have been correctly decided, it is unlikely that *Roe* can ever be respected or accepted.

ARGUMENT

I. THE CENTRAL QUESTION PRESENTED IN THIS CASE HAS NEVER BEEN RESOLVED BY THE COURT, AND IS THEREFORE BEFORE THIS COURT AS AN "ORIGINAL MATTER." THE REQUIREMENTS OF STARE DECISIS FOR OVERRULING ROE V. WADE ARE COMPLETELY SATISFIED BY THE FACTS. THE COURT SHOULD GRANT THE WRIT AND DECIDE THE CHILD'S RIGHTS.

As much as anything else, this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992) reaffirmed the central holding in the twenty-year old case of *Roe v. Wade*, 410 U.S. 113 (1973) based on principles of *stare decisis*.[91] In the Joint Opinion, the Casey Court said:

> We do not need to say whether each of us, had we been members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding. *Casey*, 112 S.Ct. at 2817.

The principles of *stare decisis* do not preclude a decision in the instant case which is different than that reached in *Roe* for two

[91] Two of the three authors previously expressed views that apparently challenged *Roe's* central holding; see, *Thornburgh v. A.C.O.G.*, 476 U.S. 747, 814, 828 (O'Connor, J., dissenting: "I do, however, remain of the views expressed in my dissent in *Akron[v. Akron]*, 462 U.S. at 459-466. The state has compelling interests in ensuring the general health and protecting potential human life, and these interests exist 'throughout pregnancy'"). Justice Kennedy joined in the opinion of the Chief Justice in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), in which he stated: "We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability."

distinct reasons: (1) the central issue in this case (when does the life of the child begin and does he/she have constitutional rights before birth?) was never decided by *Roe*; and (2) even if the doctrine of *stare decisis* does apply, Loce and Krail satisfy all of the requirements necessary to overrule *Roe*.

A. THE QUESTION OF WHEN THE LIFE OF A CHILD BEGINS WAS NOT DECIDED BY *ROE* AND IT IS THEREFORE THE DUTY OF THIS COURT TO RESOLVE THE QUESTION. IT WAS THE PROMISE OF *ROE* THAT THIS COURT WOULD DECIDE THIS ISSUE WHEN "MAN'S KNOWLEDGE" WAS SUFFICIENT TO DO SO.

Roe did not decide when the life of a child begins. The *Roe* Court specifically found that, in 1973, it could not decide the question:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer. 410 U.S. at 159 (emphasis added).

Roe specifically reserved this particular issue for later Courts by recognizing that "man's knowledge" grows and expands with new information and greater appreciation of the old. *Roe* recognized that sufficiency of knowledge is a function of time and that, because "at

this point in the development of man's knowledge" the Court could not reach a conclusion, the question was reserved for future review.

Here, the issue is before the Court "in the first instance." The Court is in no sense bound by *Roe's* inability to decide this issue and *stare decisis* is not, therefore, applicable to the issue in this case. C.f., *Baker v. Carr*, 369 U.S. 186, 236-237 (1962); *Penna.-Reading, S.S. Lines v. Bd. of Pub. Utility Commrs.*, 74 A.2d 265 (N.J. 1950) (if facts, which form the basis for a constitutional principle in one case differ in a subsequent case, the first is not precedent for the second). The legal significance of the fact that the unborn child is a human being capable of experiencing pain has never before been considered.

Casey asks the nation to accept *Roe's* central holding in an effort to finally resolve a divisive national debate. But *Roe* itself *never ruled on the central issue*, thereby reserving it for future courts. There can never be an acceptance of *Roe* until this Court decides the central issue and is able to explain with conviction that its decision is legally correct. It would constitute a "breach of faith" with the people of this nation, as well as with the constitutional principles on

which the nation was built, if the Court leaves unaddressed the question on which the entire debate turns. By refusing to answer the question of when life begins, *Roe* essentially promised that the Court would answer the question when it was able to do so. It must now do so, correctly and with convictio .

"At this point in the development of man's knowledge" we now know that a child is a complete and separate human being from conception (and certainly long before "viability") (Loce pet. 13-21) and this known fact renders *Roe's* analysis of the child's rights irrelevant (Loce pet. 9-11). These issues have now devolved upon this Court for resolution and no interpretation of *stare decisis* principles relieves the Court of the duty to address them.

B. EVEN IF PRINCIPLES OF *STARE DECISIS* WERE APPLICABLE TO THIS CASE, BECAUSE OF NEW FACTS AND A NEW APPRECIATION OF OLD ONES, *STARE DECISIS* DOES NOT PREVENT THE COURT FROM FINDING THAT THE CHILD HAS CONSTITUTIONAL RIGHTS PRIOR TO BIRTH.

Casey described four principles of *stare decisis* which were felt to preclude the overruling of *Roe*: (1) no change of fact; (2) no inconsistency with other principles of constitutional law; (3) reliance; and (4) workability. *Casey*, 112 S.Ct. at 2808-2812. These

principles, rather than precluding review, actually are absent insofar as the issue of the child's rights is concerned.

1. New Facts and a New Appreciation of Old Ones.

Justice Douglas, a member of the *Roe majority*, has said of *stare decisis*:

> [A] search for a static security - in the law - is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas...and *through the adopting of others to current facts*. It is easy...to overemphasize *stare decisis* as a principle in the lives of men. ...*The difficulty is to estimate what effect a slightly different shade of facts will have*. (emphases added) Douglas, William O., *Stare Decisis*, 49 Colum. L. Rev. 735-743, 735-736 (1949).

The new information now available about when the life of a child begins, and the fact that the child experiences pain as early as eight weeks after conception (Loce pet. 13-30), are of particular importance in this analysis.

Firstly, once it is appreciated that the child is a human being who experiences pain before birth, the Court, in order to uphold *Roe*, would have to completely ignore prior holdings of this Court and other authorities. (Loce pet. 9-11; 30-40.) If *Roe* itself ignored precedent, it is difficult to conceive of a justification to extend any

precedental value to it. Doing so would frustrate *stare decisis* principles by allowing a maverick opinion which ignores stare decisis to effect a change in the law without regard to the doctrine, whereupon other courts would be bound by *the same rules of stare decisis* to follow the decision which originally ignored them.

Secondly, new facts, or the new appreciation of old facts, are often a basis for overruling precedent. The *Casey* Court found that there were no new facts before it concerning the state's power to intrude into a woman's personal decisions. *Casey*, 112 S.Ct. at 2811-2812. Yet, *Casey* cited with approval Justice Brandeis' dissent in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413 (1932), that, in many cases where the Court applies the due process clause, the issue before it is a mixed question of fact and law and the true nature of the factual inquiry should not be obscured merely because it is a court that is making the determination. 285 U.S. at 410-411. Whether an unborn child is a human being who enjoys constitutional rights is just such a mixed question of law and fact (Loce pet.11-13).

When this Court, in *Mapp v. Ohio*, 367 U.S. 643 (1961), overruled *Wolf v. Colorado*, 338 U.S. 25 (1949) (which was decided only twelve years earlier), the Court based its ruling on a new appreciation of facts which made adoption of the "exclusionary rule" necessary. *Mapp* is an example of a case which applied the due process clause and which involved a mixed question of fact and law. The facts suggested the need for a particular method to implement a recognized right. (In the strictest sense, abortion is seen as a method of implementing an underlying privacy right.) In *Baker v. Carr*, *supra* (in which the Court overruled *Colegrove v. Green*, 328 U.S. 547 (1946) and distinguished *Colegrove v. Barrett*, 330 U.S. 804 (1946)), the Court concluded that new facts required the result.

In Loce, two ultimate facts must now be taken into consideration: (1) that Mr. Loce's child was indeed a human being from the moment of conception; and (2) that children such as his experience pain (Loce p. 13-30). Both conclusions derive from a new appreciation of old facts. They require a new recognition of the interests of the child and father, they give rise to the child's rights and they impact upon the application of due process rights. *Burnet*,

supra, (Brandeis, J. dissenting), 285 U.S. at 405-413. In addition, our experiences since *Roe*, because of new advances in contraception, the disappearance of social stigma and the new information relating to the profound harm abortion causes the mother (Loce pet. 40-44), show that abortion is an unnecessary method of implementing the privacy interest sought to be protected, as well as one which unjustly impacts the child. C.f. *Mapp v. Ohio, supra*.

2. Whether *Roe* is in Conflict with Precedent Which is at Odds with Personal Liberties Depends Upon Whether the Child is a Human Being.

The *Casey* majority argued that *Roe* is not in conflict with precedent and does not influence developments that conflict with personal liberties. Once the child's humanity is acknowledged, as it must be (Loce pet. 13-40), this conclusion is unsupportable.

Casey requires that one ignore the reality that, before birth, the child is a human being who experiences pain. *Roe* conflicts with all law which has sought to protect the interests of children and is tragically fatal for the children who suffer during abortion, as well as to the many children who survive the procedure. Before *Roe*, the New Jersey Supreme Court held that the child was a separate person

whose life began at conception and who had constitutional rights before birth. *Smith v. Brennan*, 157 A.2d 497, 504-505 (N.J. 1960); *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (N.J. 1964). This principle of New Jersey law was recently reaffirmed in *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (N.J. 1992). *Smith* and *Raleigh Fitkin* reflect New Jersey's strong policy in favor of protecting life. *Smith*, 157 A.2d 504-505; *Raleigh Fitkin*, 201 A.2d 532. This policy, prior to *Roe*, resulted in the protection of children from the pain and harm of abortion. See N.J.S.A. 2A:87-1. (Performing an abortion was a high misdemeanor which brought a penalty of fifteen years incarceration. See *New Jersey v. Novak*, 121 A.2d 521 (N.J. 1956); *New Jersey v. Siciliano*, 117 A.2d 490 (N.J. 1956)). In refusing to recognize the so-called tort of "wrongful birth", the New Jersey Supreme Court in 1967 eloquently explained New Jersey's public policy against abortion:

> It is basic to the human condition to seek life and hold on to it however heavily burdened. ...[T]he right to life is inalienable in our society. ...[W]e are not faced here with the necessity of balancing a mother's life against that of a child. The sanctity of a single human life is the decisive factor ... [I]t may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged

> determinants cannot stand against the preciousness of a single human life ... *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967).

Roe required that New Jersey abandon its policy of protecting children's lives. In 1979, even when *Roe* forced it to recognize the wrongful birth cause of action, New Jersey's Supreme Court noted:

> One of the most deeply held beliefs of our society is that life ... is more precious than non-life [citation omitted] ... concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the *sanctity of life*. The federal constitution characterizes *life as one of the three fundamental rights* of which no one can be deprived without due process of law ... our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. CONST. (1947), ART. I, SEC. I. The declaration of independence states that the primacy of man's 'unalienable' right to life is a 'self-evident truth'. Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those of non-handicapped human beings. *Berman v. Allan*, 80 N.J. 421, 429, 404 A.2d 8 (N.J. 1979).

The harm created by *Roe* is clear when one recognizes that the unborn child is a human being. Law that was carefully developed to protect innocent lives was swept away because the Court failed to recognize that these were persons in fact. For the children who are not aborted, *Roe* is often cruel. New Jersey must now recognize a cause of action, the effect of which is to tell a child that a doctor

who failed to inform his or her parents that the child would be born with a handicap, must pay large monetary damages to the parents because they lost the opportunity to terminate the child's life before birth. See, *Berman v. Allan*, *supra; Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984). That these children must live with the knowledge that their lives are devalued by society (and even by their parents) to the extent that their parents are entitled to be compensated for their "wrongful births", is a detestable harm attributable directly to *Roe*.

A father has no right to demand that a woman have an abortion, nor should he. The embarrassment, hardship or distress that flow to him as a result of an unplanned pregnancy, whether or not he is prepared to rear or support the child, is irrelevant to whether society should extend to him the "right" to take the child's life. However, where the right he seeks to enforce is one which is consistent with the child's best interests, the same statute that imposes obligations upon him based on the single act of conception, extends to him the right to affirmatively discharge his obligations through custody or visitation and support. Likewise, under the adoption statutes, a judgment of adoption in favor of another man cannot be entered

against the natural father over his objection, unless there is a specific finding of abandonment or neglect. N.J.S.A. 9:3-46. The right of a natural father who is not married to the mother is based solely on his status as genetic father. See *In re Adoption of a Child by J.R.D.*, 588 A.2d 446 (N.J. Super. Ct. App. Div. 1990).

The issue can be framed in different ways. *Casey* may choose to frame it in terms of a father blocking the mother's right to take the life of her child. The State of New Jersey, on the other hand, proposes that the child's rights, and the father's enjoyment of the benefits of his relationship with his child (which are fundamental constitutional rights), can be entrusted to another who can terminate the child's life and destroy the relationship amongst the mother, father and child for any or no reason at all.

Building on *Roe*, *Casey* found that, although a father's constitutional rights and those of a mother are "equal" after birth, the mother's rights can be exercised so as to destroy those of the father before birth. *Casey*, 112 S.Ct. at 2830. This may be the consequence of *Roe*, but it is drastically in conflict with precedents dealing with the equal protection of the laws. See *Craig v. Boren*, 429 U.S. 190

(1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (gender based classifications require at least an interemediate level of scrutiny -- strict scrutiny if there is the denial of a fundamental right[92]).

Under the New Jersey Parentage Act N.J.S.A. 9:17-40 *et seq.*, the obligations of Mr. Loce as father derive from the fact of conception alone. The birth, of course, is the natural consequence of conception.

If the fundamental constitutional right of the father is implicated, then the creation of a classification extending exclusive decision making power to the mother violates equal protection principles because there is no compelling interest in the state to permit this. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Baker, supra*. If the father's constitutional rights are not fundamental, then the classification created is gender based and requires intermediate scrutiny. *Craig v. Boren*, 429 U.S. 190 397 (1976). As a result, the state classification must serve important governmental objectives and be substantially related to the achievement of those objectives. The objective here is to protect the right of the mother to make decisions

[92] *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

about whether she should have children. See *Roe*, 410 U.S. at 153. That objective, however, is served once the mother conceives; she then has a child and, at that point, the inconvenience to the mother of carrying the child, although real and substantial, can never outweigh the child's interest in life.

3. Given the Fact that the Child is a Human Being, the Principles of Reliance and Workability Have no Application.

In *Casey* the Court said that, since some segments of our society have relied on the Court's holding in *Roe*, it should be affirmed (*Casey*, 112 S.Ct. at 2809), even if the Court cannot say that it was correctly decided in the first place. *Id.* at 2817.

By *Casey's* own estimation, the last case before the Court which required it to determine an issue of the magnitude of those raised here, was *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954). *Casey*, 112 S.Ct. at 2814-2815. The irony of *Casey's* discussion of reliance is in the fact that it was the very same argument made by those who sought in *Brown* to perpetuate racial segregation by affirming *Plessy v. Ferguson*, 163 U.S. 537 (1896). The reliance argument in *Casey* is indistinguishable from the reliance argument of

the four states which sought to preserve segregation in the consolidated cases that are collectively known as *Brown v. Bd. of Ed.*[93]

Arguing that longstanding principles which have been continually relied upon should be left unchanged, John W. Davis argued in *Briggs, supra*, that "somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance." 49A Landmark Briefs at 490. Davis asserted that the South Carolina statute must stand because:

> [W]e *relied* on the facts that this Court had, not once but seven times, ... pronounced in favor of the "separate but equal" doctrine. We *relied* on the fact that the courts of last appeal in some sixteen or eighteen states have passed upon the validity of

[93]*Brown* was actually a grouping of four segregation cases decided together. The other cases were *Briggs v. Elliott*, *Davis v. County School Board of Prince Edward County, Va.*, and *Gebhart v. Belton*. These cases concerned various statutes pertaining to school segregation in the states of Kansas, South Carolina, Virginia, and Delaware. Although, decided separately, *Bolling v. Sharpe*, 347 U.S. 497 (1954) was also argued with *Brown*. The initial oral argument for these cases occurred before the United States Supreme Court on December 9-11, 1952, with Chief Justice Vinson presiding. The cases were subsequently reargued at the Court's request on December 7-9, 1953, after Earl Warren succeeded Mr. Vinson as Chief Justice.

> the "separate but equal" doctrine vis-a-vis the Fourteenth Amendment. We *relied* on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia. *Id.* (Emphases added).

Indeed, it was the theme of all of the states that desegregation was contrary to longstanding customs and traditions which were "deeply ingrained", the disturbance of which would cause such dire consequences that, on those grounds alone, *Plessy* had to be affirmed. See, J. Lindsay Almond, *id.* at 383-384; 512-513; Kansas, *id.* at 752; Davis, *id.* at 490-491; T. Justin More, *id.* at 407; 510-511; *Casey* observed:

> While we think *Plessy* was wrong the day it was decided, [citation omitted], we must also recognize that the *Plessy* court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to examine *Plessy* was on this ground alone not only justified but required. *Casey*, 112 S.Ct. at 2813.

This statement is important in the instant case because, whether or not the *Roe* Court believed that it could determine when the life of a human being begins, no one can now, in light of current evidence, dispute that the biological life of a complete, separate and unique human being begins at conception. The Court likens *Brown* to *Roe*, but *Roe* more closely resembles *Plessy* than *Brown* and *Brown* more

closely resembles Loce than *Roe*. *Roe* simply does not possess the moral force of *Brown*. *Brown* corrected a wrong. *Roe* created one.

The Court should grant certiorari in this case without fear that the overruling of *Roe* will be any more difficult to implement than was the ruling in *Brown* -- and no harder for the public to accept. When it is understood that these children are human beings who experience pain and that the premise of this nation is that the life of every human being has value and that each one of us is unique and irreplaceable, an acceptance of the overruling of *Roe* will follow.

CONCLUSION

Because *Roe* did not decide the central issues presented by this case, and the principles of *stare decisis* as applied to this case do not otherwise preclude the overruling of *Roe*, the Court should grant the writ of certiorari as requested.

Calum B. Anderson

CALUM B. ANDERSON, ESQ.

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#'s 93-1148 and 93-1149

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

#93-1148

ALEXANDER LOCE, *Petitioner,*

v.

STATE OF NEW JERSEY, *Respondent.*

#93-1149

TINA KRAIL, et. al., *Petitioners,*

v.

STATE OF NEW JERSEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF

JOSEPH SCHEIDLER AND THE PRO-LIFE ACTION LEAGUE

AND OF TEXAS BLACK AMERICANS FOR LIFE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER LOCE AND PETITIONERS KRAIL, ET. AL.

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QUESTIONS PRESENTED

Whether anything in the Due Process Clause, as explained in Roe v. Wade, requires the states to make any person a criminal?

Whether the decision of the trial court, pursuant to Roe, to exclude evidence which negates the criminal state of mind places Roe squarely at odds with other precedents of this Court?

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INTEREST OF THE *AMICI*

Joseph Scheidler and the Pro-Life Action League seek to promote public awareness of the prevalence of abortion, and to protest against its performance; Joseph Scheidler and the Pro-Life Action League were named party defendants/respondents in this Court's case of first impression, decided Monday, January 24, 1994, on the question of whether a plaintiff in a case based on the Racketeer Influenced and Corrupt Organizations Act (RICO) must prove an economic motive on the part of the defendants.

Texas Black Americans for Life is an organization which seeks to promote awareness that abortion is a tool of racial genocide.

SUMMARY OF ARGUMENTS

The holding of the trial court, which will be followed in other cases, overrules this Court, places its precedents at odds with one another, and illustrates that Roe v. Wade fosters erroneous decisions by the lower courts.

Not allowing one to introduce evidence which negates the criminal state of mind violates the Due Process Clause. Also, Roe does not even require the exclusion of the evidence offered at trial.

Nothing in the Due Process Clause requires the states to make any person a criminal.

This case illustrates that Roe v. Wade is unsound in principle and unworkable in practice.

Planned Parenthood v. Casey succeeded only in confusing the law of *stare decisis*. Further, this case will enable this Court to do what it wanted to do in Casey but was unable to accomplish.

ARGUMENT

I. NOTHING IN THE DUE PROCESS CLAUSE REQUIRES THE STATES TO MAKE ANY PERSON A CRIMINAL.

The trial court concluded that the conviction of the defendants was compelled by Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973), which was based on the Due Process Clause of the Fourteenth Amendment. But the Due Process Clause has never been held to require the states to make any person a criminal; it has only been used the other way—prohibiting the states from making persons criminals in certain instances.

The submission that the Due Process Clause, which *prohibits* the states from extending their criminal laws against private citizens in certain instances, now *affirmatively requires* the states to extend their criminal laws against private citizens in certain instances, is too novel a theory for this Court to let stand.

The trial court's holding turns our entire body of jurisprudence on the Due Process Clause inside out. That view of the Due Process Clause is like looking through a pair of binoculars the wrong way. And it is statism, one of the things which the Fourteenth Amendment was designed to protect us against.

By taking this case, this Court can prevent the development of the erroneous notion that the Due Process Clause requires the states to make certain persons criminals. If this Court refuses to take this case, it can only set the stage for a more egregious upheaval in our law later on, when the doctrine is firmly entrenched.

II. THE LANGUAGE OF ROE v. WADE DOES NOT REQUIRE THE EXCLUSION OF THE EVIDENCE OFFERED AT TRIAL.

The trial court erred in thinking Roe requires a court to exclude evidence, offered by the defense in a criminal case, which

demonstrates a reasonable, good faith belief that an unborn child is a person. The language of Roe does not support this conclusion.

This Court said in Roe,

> "All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729, 35 L.Ed.2d at 180.

This Court also said,

> "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." 410 U.S. at 162, 93 S.Ct. at 731, 35 L.Ed.2d at 182.

A. THERE IS NO STATE ACTION.

In Roe, the State of Texas could not, by adopting one theory of life, override the rights of the pregnant woman. But the case at bar involves action by a private citizen, not by a state. And without state action, there is no denial of Due Process. As this Court said,

> "The Fourteenth Amendment protects this [Due Process] interest, however, only from a deprivation by state action. Private use of state-sanctioned private remedies or procedures does not rise to the level of state action." Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 485, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565, 575 (1988).

This Court noted, in the same paragraph, that state action may be found "...when private parties make use of state procedures with the overt, significant assistance of state officials... ." 485 U.S.

at 486, 108 S.Ct. at 1345, 99 L.Ed.2d at 576. But no such thing occurred here.

Nor is the law of the State of New Jersey pertaining to the reasonable, good faith belief of the need to protect a third person an attempt to frustrate Roe. For that law pertains to all cases in which the defense of a third person is implicated, not just abortion. State v. Fair, 45 N.J. 77, 90-91, 211 A.2d 359, 366 (1965).

Further, the provisions of New Jersey law relied on for the affirmative defenses have been in existence since long before Roe. Article One of the Constitution of the State of New Jersey was adopted in 1947. N.J.S.A. 2C: 3-5 and 18-3 are simply reenacted versions of statutes which were in place since 1898.

Also, as Prof. Knowlton has explained, the other affirmative defense provisions which were asserted were simply formal codifications of the law of the State of New Jersey as it had already existed. *See*, Knowlton, Comments Upon the New Jersey Penal Code, 32 Rutgers L. Rev. 1, 3 (1979).

Further, the reluctance of the New Jersey judicial system at all levels to rule in favor of the petitioners demonstrates that the law of the State of New Jersey is not an attempt to frustrate Roe.

B. FOURTEENTH AMENDMENT PERSONHOOD IS NOT AN ELEMENT OF THE AFFIRMATIVE DEFENSES.

The trial court based its decision on this Court's holding in Roe that an unborn child is not a person within the meaning of the Fourteenth Amendment. But this has no application here.

Fourteenth Amendment personhood is a status whereby a given *res* may assert its own rights against state action. With the exception of *in rem* proceedings, the status is inherent—at all times, for all purposes, and against all others—in the *res* itself; it exists independently of anyone else's actions or thought processes.

The focus of the affirmative defenses raised at trial, however, is simply not on the thing sought to be protected; the defenses pertain to something which exists only for a moment in the mind of the criminal defendant: the reasonable, good faith belief which motivated the conduct.

Fourteenth Amendment personhood (i.e. the possession by a *res* of federal rights against state action) need not obtain in the thing sought to be protected; the governing personhood is personhood within the meaning of state law. For it is from the state constitution that the legislature and the state courts derive their authority to pronounce the affirmative defenses, and to define the terms therein; and one of the defenses is Article One of the state constitution itself.

The language of the leading New Jersey case would even, on its face, support the position that the status of personhood need not obtain in the thing sought to be protected. Indeed, if someone used force to prevent someone from burning a rumpled-up bundle of clothing which he reasonably, and in good faith, thought was a person lying helpless on the ground, the fact that there was only clothing would not seem to defeat the defense.

Consider what the Supreme Court of New Jersey said,

> "There are, however, two approaches as to the scope of the right of one person to intervene in defense of another. One is that the fault of the defended party is imputed to the one who intervenes on his behalf, while the other is that the intervening party is bound only by his own intent. The former, commonly referred to as the 'alter ego' rule, emphasizes that the right of one person to defend another is co-extensive with the right of the other to defend himself. The latter categorized as the 'objective test' theory, proceeds on the thesis that one who intervenes in a struggle under a reasonable but mistaken belief that he is protecting another who he assumes is being unlawfully assaulted is thereby exonerated from criminal liability. As stated by

Bishop (1 Bishop, Criminal Law (Sect.) 303, p. 204 (9th ed. 1923)):

> 'What is absolute truth no man ordinarily knows. All act from what appears, not from what is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move. *** All, therefore, must, and constantly do, perform what else they would not, through mistake of facts. *** '

"See generally 1 Wharton supra, (Sect.) 219; Comment, 20 Wash. & Lee L. Rev. 98 (1963); Comment, 64 W.Va. L. Rev. 342 (1962).

> "New Jersey has aligned itself with the latter view; the test of whether a party may intervene in defense of a third person being determined by the subjective intent of the intervenor, subject only to the qualification that a jury objectively find that he reasonably arrived at the conclusion that the *apparent* victim was in peril, and that the force he used was necessary. Thus, the so-called "reasonable mistake of fact" doctrine is given its due, both as to the amount of force and the initial lawfulness of the intervention, *and precludes criminal liability* even though it later appears that the person in whose behalf he intervened was in fact the aggressor or that no defensive measures on his part were actually necessary. [citations omitted] Such a view has been recommended by the American Law Institute in its Model Penal Code..." (citation omitted) State v. Fair, 45 N.J. 77, 92-93, 211 A.2d 359, 367-368 (1965). (emphasis supplied)

Thus we see that the Supreme Court of New Jersey, upon careful consideration of the question, expressly rejected the doctrine which says that the defenses are available only when the one sought

to be protected is in fact a person who has the right to self-defense. The focus instead is solely on the state of mind of the defendant.

III. NOT ALLOWING ONE TO INTRODUCE EVIDENCE WHICH NEGATES THE CRIMINAL STATE OF MIND VIOLATES THE DUE PROCESS CLAUSE.

The effect of a denial of this petition will be to exclude the evidence offered at trial, and set as precedent the exclusion of similar evidence in future cases, at least in the State of New Jersey. This Court has recognized, however, that not allowing the introduction of relevant evidence in a criminal case violates the Due Process Clause. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308 (1973); U.S. v. Nixon, 418 U.S. 683, 711-713, 94 S.Ct. 3090, 3109-3110, 41 L.Ed.2d 1039, 1066-1067 (1974). Such shall be the case here if the petitioners are not afforded their opportunity to present evidence of their reasonable, good faith belief that an unborn child is a person.

Under New Jersey law, defense of a third person negates an element of the prosecution's case in chief: the criminal state of mind; and New Jersey law requires the introduction of such evidence. As the New Jersey Supreme Court said,

> "An essential element of the charge of murder is malice [citation omitted], and in order for criminal liability to attach there must be a concurrence of an 'evil-meaning mind with an evil-doing hand.' [citations omitted] Basically, the so-called 'affirmative defense' of defense of another in murder cases *negates the existence of the essential element of malice*. What was said in State v. Abbott, 36 N.J. 63, 72, 174 A.2d 881, 868 (1961), in connection with self-defense is equally applicable to defense of a third party:
>
> > *** '...if such evidence appears either in the State's case or upon the defendant's case, the issue must be left to the jury with this instruction: that the burden

> is upon the State to prove beyond a reasonable doubt that the defense is untrue, and hence there must be an acquittal if there is a reasonable doubt as to whether defendant did act in self-defense within the definition of that defense. ***' " State v. Fair, 45 N.J. 77, 90-91, 211 A.2d 359, 366 (1965) (emphasis supplied).

In Chambers and Nixon this Court effectively recognized that censorship in the courtroom is as destructive of liberty as censorship in the press. The Court should not retreat from this.

IV. THE DECISION OF THE TRIAL COURT PROMOTES A GROSS BREACH OF THE SEPARATION OF POWERS AND OF FEDERALISM.

It would be difficult to imagine a more radical breach of the separation of powers. If this Court were to acquiesce continually in holdings such as this one, this Court would effectively require the states to repeal certain laws of their own and make new ones against private citizens whose actions frustrate restrictions which this Court has placed on state action, not on the action of private citizens.

Further, given the federal nature of our Union, it would be difficult to imagine a more gross breach of federalism, going even beyond the boundaries set down in Missouri v. Jenkins, 495 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). For in Jenkins, at least, this Court construed the scope of authority of Article III courts under an act of Congress.

The acceptance by this Court, and other federal courts, of what happened in this case, however (and will happen again in later cases), would completely circumvent the requirement recognized in Jenkins that the overriding of state sovereignty by federal law take place only in pursuance to an act of Congress specifically intended to do such a thing. *See also*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

This would constitute a dangerous precedent for allowing this requirement to be completely overlooked in other areas, effectively rendering the federal judiciary a body of general jurisdiction rather than one of a limited nature.

It would render the Tenth Amendment a curiosity, a conversation piece, or perhaps, at best, an interesting piece of wallpaper. But it would cease to be a statement of law in our most basic governing document.

V. CLARIFICATION BY THIS COURT IS NEEDED BECAUSE THE HOLDING OF THE TRIAL COURT OVERRULES THIS COURT, AND DEMONSTRATES THAT ROE PLACES THIS COURT'S PRECEDENTS AT ODDS WITH ONE ANOTHER WHILE FOSTERING ERRONEOUS DECISIONS BY THE LOWER COURTS.

In Planned Parenthood v. Casey the Joint Opinion expressed the view that courts building upon Roe will not be likely to hand down erroneous decisions as a consequence. Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 2810, 120 L.Ed.2d 674, 702 (1992) (Joint Opinion). But the trial court's action in the instant case, overruling this Court's precedents, and setting them at odds with each other, belies that view, as does the record subsequent to Roe.

Eventually this Court must rule on the issues presented in this case. If it denies certiorari in every such case presented, it will have ruled *sub silencio on* these issues, but without giving society the benefit of its reasoning.

A. THE TRIAL COURT OVERRULED THIS COURT.

By refusing to consider evidence of the petitioners' reasonable, good faith belief that Mr. Loce's unborn child was a person in need of their intervening help, the trial court overruled this Court's holdings in Chambers and Nixon, *supra*. Other courts, following the lead in this case, will do so also.

B. ROE REQUIRES UNHEARD OF AND UNWARRANTED APPLICATIONS OF THE DUE PROCESS CLAUSE.

If this Court allows judgments such as the one in this case to stand, it will be irrefutable that this Court will have allowed an expansion of Due Process law into the field of affirmatively requiring the states to make certain persons criminals. So radical a change as that should not come from a silent Court.

Further, unless this Court eventually reverses a case like this one, it will be equally clear that this Court will have accepted the unheard of doctrine that nonpersonhood status in one thing diminishes the rights held by another, one who is a person. Such a radical change as this likewise should not come from a silent Court.

Also, Roe has even been relied upon to enjoin the operation of a state statute without there ever being a finding of unconstitutionality or any other violation of federal law. Ragsdale v. Turnock, 734 F.Supp. 1457 (N.D. Ill. 1990); *aff'd* 941 F.2d 501 (7th Cir. 1991); *cert. den. sub nom.* Murphy v. Ragsdale, ___U.S. ___, 112 S.Ct. 879, 116 L.Ed.2d 784 (1992). In that case the District Court accepted a settlement proposal in which the Attorney General of a state and some private citizens literally rewrote a state statute, actions on their part which clearly lacked any authority under the state constitution.

Simultaneously, that settlement proposal struck down the most basic health and safety requirements: that an abortion clinic's hallways be wide enough for an ambulance stretcher to pass through, that any such clinic be within a few minutes' ambulance ride of a hospital, and that the ventilation system be designed to prevent widespread contamination by airborne bacteria, which can cause infections in a woman's bleeding reproductive tract. Thanks to that settlement proposal, it is now legal in the State of Illinois for the abortionist to scrub his hands in the same sink in which the janitor cleans his toilet bowl brush.

It gets worse. Roe has been relied on to strike down a state statute prohibiting fetal experimentation or the sale of unborn children. Lifchez v. Hartigan, 735 F. Supp. 1361, 1376-1377 (N.D. Ill. 1990); *aff'd* 914 F.2d 260 (7th Cir. 1990); *cert. den. sub nom.* Scholberg v. Lifchez, 498 U.S. 1069, 111 S.Ct. 787, 112 L.Ed.2d 850 (1991).

C. ROE SETS THIS COURT'S PRECEDENTS AT ODDS WITH ONE ANOTHER.

In Casey the Joint Opinion noted that if Roe were to portend a development "at odds with other precedent for the analysis of personal liberty," this would prove to be grounds for overruling Roe. *See*, Casey, *supra*, 112 S.Ct. at 2812, 120 L.Ed.2d at 704. Such is what has happened here. For in not allowing the petitioners to introduce evidence negating the criminal state of mind, the trial court set this Court's precedents of Roe, on the one hand, and Chambers and Nixon, *supra*, on the other hand, at odds with one another.

We are left wondering what is good law and what isn't. The words of the Joint Opinion in Casey are again applicable here:

"Liberty finds no refuge in a jurisprudence of doubt." 112 S.Ct. at 2803, 120 L.Ed.2d at 693.

Also, the concept that the Due Process Clause places an affirmative obligation on the states to make certain persons criminals has never arisen in our jurisprudence before, and will be applicable, as a practical matter, only against those who engage in civil disobedience because of their political and religious opposition to abortion. As such, it will effectively be "a law directed at speech itself," in contravention of this Court's First Amendment holding in Texas v. Johnson, 491 U.S. 397, 406, 109 S.Ct. 2533, 2541, 105 L.Ed2d 342, 355 (1989).

Further, even though the trespass statute under which the petitioners were convicted may be generally applicable to all, so as

to avoid any clash with the Free Exercise Clause of the First Amendment, it will remain the case, nevertheless, that the doctrine that the Due Process Clause itself affirmatively requires the states to make certain persons criminals will not be generally applicable to all; this doctrine itself will be applied only to abortion protesters, and as such will contravene this Court's numerous prior holdings. *See*, Employment Division v. Smith, 494 U.S. 872, 876-878, 110 S.Ct. 1595, 1599-1600, 108 L.Ed.2d 876, 884-885 (1990).

D. THE TRACK RECORD UNDER ROE DEMONSTRATES THAT ROE IS THE PROBLEM.

The above cited examples of chaos in our jurisprudence all have one thing in common: Roe. In Casey the Joint Opinion speculated that Roe might be *sui generis*. But *sui generis* just doesn't explain it. Roe is a renegade---an accident waiting for the next opportunity to occur, waiting for its next victim (Due Process, the First Amendment, unborn children, federalism, the separation of powers, expectant fathers, etc.) to step in line.

The chaos begins in Roe itself, as the Joint Opinion in Casey learned when it tried to untangle the basic premise of Roe from Roe's rigid, trimester framework 112 S.Ct. at 2816-2821, 120 L.Ed.2d at 709-716. Roe was also contradictory in its approach to the relevance of biomedical facts to the protection of the unborn.

This Court first said that the findings of the discipline of biology were of no moment in determining whether an unborn child is a person or not. 410 U.S. at 159, 93 S.Ct. at 730, 35 L.Ed.2d at 181. But just a few pages later this Court then went on to deny protection to the unborn in the early stages of pregnancy on the basis of "the now-established medical fact...that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." 410 U.S. at 163, 93 S.Ct. at 731-732, 35 L.Ed.2d at 182. This juxtaposition of reliance on medical facts to deny protection for the unborn, coming immediately after a total disregard for such facts in recognizing rights for the unborn, suggests a double standard in the most obvious way.

Significantly, the Joint Opinion in Casey chose to recognize the obvious: medical facts pertaining to the unborn child---in Casey, the concept of viability---are indeed relevant in determining the status of laws pertaining to the unborn child. 112 S.Ct. at 2817, 120 L.Ed.2d at 710.

Yet Roe remains today what Justice White said of it on the day it was decided: "...an exercise of raw judicial power...an improvident and extravagant exercise of the power of judicial review...[with] no constitutional warrant..." *See*, Roe, 410 U.S. at 222, 93 S.Ct. at 763, 35 L.Ed.2d at 196 (White, J., dissenting).

Roe has tied the cloth of our jurisprudence in a knot. It has done so before. *See*, Bopp and Coleson, The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal, 2 B.Y.U. J. Pub. L. 181 (1989). It continues to do so now. It begs for reversal.

VI. THIS CASE ILLUSTRATES THAT ROE v. WADE IS UNSOUND IN PRINCIPLE AND UNWORKABLE IN PRACTICE.

The clash of interests here is irreconcilable: On the one hand we have pregnant women claiming a constitutional right under the Due Process Clause, a right which the justices who authored the Joint Opinion in Casey admitted they might not have recognized had the case been before them in the first instance. *See*, Casey, *supra*, 112 S.Ct. at 2817, 120 L.Ed.2d at 711.

On the other hand we have the protesters claiming their right under the Due Process Clause, a right never questioned by this Court, to present evidence which negates the criminal state of mind. The need of the State of New Jersey to uphold the law and preserve the peace, meanwhile, is well known to all.

The arguments of the petitioners---which we accept---regarding the personhood of unborn children aside for a moment, this case does illustrate, if nothing else, that there is a compelling

state interest in the area of abortion, an interest which requires the overruling of Roe.

Roe is unsound in principle and unworkable in practice. As this Court has noted, if a prior holding of this Court is later found to be unsound in principle and unworkable in practice, that will constitute grounds for overruling the prior case. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546, 105 S.Ct. 1005, 1015, 83 L.Ed.2d 1016, 1031 (1985). The Joint Opinion in Casey recognized this would apply to Roe. *See*, Casey, *supra*, 112 S.Ct. at 2809, 120 L.Ed.2d at 700.

A. ROE IS NOT NEEDED TO PROTECT WOMEN AGAINST FORCED ABORTIONS.

In Casey the Joint Opinion expressed the concern that without Roe women could be forced to undergo abortions against their will. 112 S.Ct. at 2811, 120 L.Ed.2d at 703. But as Justice O'Connor pointed out in a case involving the other end of life's spectrum, any forced bodily invasion would constitute a classic example of a forcible restraint of one's liberty; it would also constitute an intrusion into one's body of the type that would burden the woman's liberty, dignity, and freedom to determine the course of her own life. Thus, it would run afoul of this Court's previously stated notions of constitutionally permissible state action. *See*, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. at 287-289, 110 S.Ct. at 2856-2857, 111 L.Ed.2d at 247-249 (1990) (O'Connor, J., concurring).

VII. PLANNED PARENTHOOD v. CASEY SUCCEEDED ONLY IN CONFUSING THE LAW OF *STARE DECISIS*.

In Casey the Joint Opinion went to great lengths to state that the decision reached therein was required by the doctrine of *stare decisis*. *See*, Casey, *supra*, 112 S.Ct. at 2808-2816, 120 L.Ed.2d at 699-709. Paradoxically, however, the Joint Opinion overruled this Court's precedent on *stare decisis* without even stating why it was doing so.

In 1932 Justice Brandeis penned his famous dissent in which he wrote,

> "Stare decisis is usually the wise policy, because in most matters is more important that the applicable rule of law be settled than that it be settled right. [citation omitted] This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." (citation omitted)

Burnett v. Coronado Oil and Gas Co., 285 U.S. at 406-408, 52 S.Ct. at 447-448, 76 L.Ed. at 823-825 (1932) (Brandeis, J., dissenting). The footnotes in Justice Brandeis' opinion, omitted above, and footnote four of his opinion following the above quoted text, cite a very large number of cases as examples of what he was saying.

The force of this logic was finally expressly adopted by this Court a year after Roe was decided. *See*, Edelman v. Jordan, 415 U.S. 651, 671, n. 14, 94 S.Ct. 1347, 1359, n. 14, 39 L.Ed.2d 662, 667, n. 14 (1974). It has been followed by this Court since then. *See*, Solario v. U.S., 483 U.S. 435, 450, 107 S.Ct. 2924, 2933, 97 L.Ed.2d 364, 378 (1987).

In Casey, however, the Joint Opinion did not follow this precedent on *stare decisis*. The Joint Opinion did not even confront the issue, let alone explain why it was doing what it did. Only a fleeting reference to Burnett was made, one which did not even acknowledge the fact that Justice Brandeis' reasoning had been adopted by this Court. *See*, Casey, 112 S.Ct. at 2808, 120 L.Ed.2d at 700.

Consequently, the Joint Opinion, in attempting to uphold the doctrine of *stare decisis*, overruled this Court's precedent on *stare decisis*, and succeeded only in confusing that area of law. That this should be done by only three members of this Court---and *only* in an abortion case!---speaks volumes about this Court's willingness to bend the rules any time the topic of abortion is at hand.

Is the rule of Justice Brandeis, adopted by this Court in Edelman, still good law? Further clarification is needed.

In reconsidering this question (which Casey means this Court must surely do again someday), this Court should recognize that of the two views of *stare decisis* on constitutional law---the view of Justice Brandeis, and the one adopted by the Joint Opinion in Casey---only one is consistent with the nature of a constitution. For if a constitution is a standard against which all other law---opinions of this Court included---is to be measured, then any departure from it, whether it be legislative or judicial in nature, must be recognized as error and corrected.

Chief Justice John Marshall, in considering a case in constitutional law, reminded us,

"...we must never forget that it is a *constitution* we are expounding." McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579, 602 (1819). (emphasis in original)

To do otherwise is to stand the very nature of a constitution on its head. The substantial obstacles raised by Article V to the amending of the U.S. Constitution were created to protect the minority from the whim of the majority. But if this Court adopts the same rule about overruling erroneous precedent in constitutional law as it does in statutory cases, it will place upon a minority the impossible task of obtaining a super majority to amend the Constitution so as to overrule the erroneous precedent. A decision by this Court not to overrule erroneous precedent on constitutional

issues will thus become a means of turning the guarantees of Article V inside out.

The opinion of Justice Brandeis gives further instruction, saying,

> "In cases involving the Federal Constitution the position of this court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.
>
> "The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting the Constitution. **** *This is strikingly true of cases under the due process clause* when the question is whether a statute is unreasonable, arbitrary, or capricious..." *See*, Burnet, *supra*, 285 U.S. at 409-410, 52 S.Ct. at 448-449, 76 L.Ed. at 826. (emphasis supplied)

In Casey the issue was what would happen to the Court's legitimacy if it should overrule precedent. 112 S.Ct. at 2814-2816, 120 L.Ed.2d at 706-709. But none will ever question the legitimacy of a Court which recognizes that it must submit itself to the very Constitution which it is established to uphold and defend, and which pays homage to the patriots who fought and gave their lives to enshrine that document as the supreme law of the land.

VIII. THIS CASE WILL ENABLE THIS COURT TO DO WHAT IT WANTED TO DO IN CASEY BUT WAS UNABLE TO ACCOMPLISH.

In Casey the Joint Opinion stated that the Court was reaching the decision it did because doing so was necessary to fulfill this Court's perceived mission to take on such issues and settle them

with finality on behalf of the nation as a whole. Casey, *supra*, 112 S.Ct. at 2815, 120 L.Ed.2d at 708. In doing so the Joint Opinion went to great lengths to reaffirm Roe's central holding repeatedly, so as to leave no doubt as to what it was doing. 112 S.Ct. at 2804, 2808, 2816-2818, 2821, 120 L.Ed.2d at 694, 699, 709-712, 715-716.

Simultaneously, however, the Joint Opinion went out of its way to note that none of the criteria for reexamining the precedent of Roe *de novo* seemed to be present, and that thus the Court would not do so in that case. 112 S.Ct. at 2808-2816, 120 L.Ed.2d at 699-709. This was true even though those who authored the Joint Opinion declared that they were expressing no comment as to whether they would have agreed with the holding in Roe had the case been before them in the first instance. 112 S.Ct. at 2817, 120 L.Ed.2d at 711. The possibility of reexamining Roe at a later date, when the right case came along, was reserved by the Joint Opinion. 112 S.Ct. at 2808-2815, 120 L.Ed.2d 699-704, 706, 708-709.

These two concepts—settling Roe once and for all, and expressly avoiding reexamining it *de novo* (while keeping that option open for a future case), operate to the exclusion of each other. Roe can never be settled once and for all while this Court keeps brushing aside opportunities to reexamine it and tell us whether it is truly a case which can stand the test of time.

There could be no better case for finally settling this once and for all. For if this Court is going to reaffirm Roe in a case in which:

1.) the father of an unborn child was turned down by the judiciary in his attempt to seek an injunction against the destruction of his own child;

2.) one in which the trial court denied him the opportunity to present evidence which negates the criminal state of mind, thereby overruling the precedents of this Court itself on that point;

3.) one in which voluminous testimony of new facts elucidated since Roe was offered at trial by internationally renowned experts in support of the personhood of the unborn child and the newly found capacity of unborn children to feel pain;

4.) one in which this Court would, for the sake of preserving Roe, adopt the extraordinary new doctrine that the Due Process Clause places an affirmative obligation on the states to make certain persons criminals (and one which would apply to no one of any other political or religious conviction, at that);

5.) one in which this Court would, for the sake of preserving Roe, adopt the extraordinary new doctrine that nonpersonhood status in one thing diminishes the rights held by one who is a person;

6.) one in which this Court would, for the sake of preserving Roe, countenance a breach of the highest order of the separation of powers and of federalism; and

7.) one in which this Court, for the sake of preserving Roe, would be content to leave its precedents concerning Due Process and First Amendment interests at odds with themselves;

then nothing will ever get this Court to change its mind about Roe. And those of us who someday hope to achieve an overruling of Roe will know that no short term gain is to be had, and that our strategy must be for the long term in the strictest sense.

On the other hand, if Roe is the type of case which will not stand the test of time, and will fall upon reexamination of it *de novo*, there could be no better case than this one for telling us that this is so.

Either way, this case will enable this Court to do what it wanted to do in Casey but could not accomplish: settle the status of Roe once and for all.

IX. THE RECORD AT THE TRIAL LEVEL INVITES A REEXAMINATION OF ROE.

The record at trial is well developed. The petitioners presented ample evidence of facts newly elucidated since Roe was decided concerning the personhood Mr. Loce's unborn child, and its capacity to feel pain; there was also ample opportunity for cross-examination.

In Casey the Joint Opinion expressed the view that when the facts underlying a prior holding are newly found to be different from what this Court had previously assumed, the new finding will constitute grounds for overruling a prior case such as Roe. 112 S.Ct. at 2811-2812, 120 L.Ed.2d at 703-704. The Joint Opinion even noted that such newly discovered facts can not only justify overruling a prior case of great public notoriety, they can even require it, as was the case in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954).

The issues of personhood, and the capacity to feel pain, being as important as they are, we submit that such is the case here.

The task before this Court may be daunting, but the application of reasoned judgment to the facts of this case will enable this Court to perform this task, one which it ultimately must face anyway. *See*, Casey, *supra*, 112 S.Ct. at 2806, 120 L.Ed.2d at 697.

This Court should take this case and overrule Roe.

CONCLUSION

Wherefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel

No. 93-1148
No. 93-1149

FEB 15 1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCE,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

TINA KRAIL, ET ALS.,

Petitioners,

- against -

THE STATE OF NEW JERSEY,

Respondent.

BRIEF AMICUS CURIAE OF MOTHER TERESA OF CALCUTTA, IN SUPPORT OF PETITIONERS' PETITIONS FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Mother Teresa resides at 541A Ach. Jagdish, Ch. Bose Rd., Calcutta, India 700 016. She is the founder and Mother Superior of the Order of the Missionaries of Charity. The Order maintains its headquarters in Calcutta, India. The Missionaries of Charity have provided services to the needy in many parts of the world, including the United States of America, where the Order's main office is located at 335 East 145th Street in the Bronx, New York. Much of the work of the Missionaries of Charity involves providing charitable services to children and to poor families. Through this work Mother Teresa and the Missionaries of Charity have a special interest in the welfare of all children, born and unborn, and the familial relationship between children and their mothers and fathers.

SUMMARY OF ARGUMENT

The unborn child possesses an inalienable right to life which must be recognized and safeguarded by any just society.

ARGUMENT

I. THE QUESTION WHETHER UNBORN HUMAN BEINGS POSSESS THE INALIENABLE RIGHT TO LIFE IS OF THE GREATEST IMPORTANCE AND MUST NOT BE AVOIDED BY THIS COURT.

I hope you will count it no presumption that I seek your leave to address you on behalf of the unborn child. Like that child I can be called an outsider. I am not an American citizen. My parents were Albanian. I was born before the First World War in a part of what was not yet, and is no longer, Yugoslavia. In many senses I know what it is like to be without a country. I also know what it is like to feel as an adopted citizen of other lands. When I was still a young girl I travelled to India. I found my work among the poor and the sick of that nation, and I have lived there ever since.

Since 1950 I have worked with my many sisters from around the world as one of the Missionaries of Charity. Our congregation now has some over 400 foundations in more than 100 different countries, including the United States of America. We have almost 5,000 sisters. We care for those who are often treated as outsiders in their own communities by their own neighbors -- the starving, the crippled, the impoverished, and the diseased, from the old woman with a brain tumor in Calcutta to the young man with AIDS in New York City. A special focus of our care are mothers and their children. This includes mothers who feel pressured to sacrifice their unborn children by want, neglect, despair, and philosophies and governmental policies which promote the dehumanization of inconvenient human life. And it includes the children themselves, innocent and utterly defenseless, who are at the mercy of those who would deny their humanity. So, in a sense, my sisters and those we serve are all

outsiders together. At the same time, we are supremely conscious of the common bonds of humanity that unite us and transcend national boundaries.

In another sense no one in the world who prizes liberty and human rights can feel anything but a strong kinship with America. Yours is the one great nation in all of history which was founded on the precept of equal rights and respect for all humankind, for the poorest and weakest of us as well as the richest and strongest. As your Declaration of Independence put it in words which have never lost their power to stir the heart:

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. . . .

A nation founded on these principles holds a sacred trust: to stand as an example to the rest of the world, to climb ever higher in its practical realization of the ideals of human

dignity, brotherhood, and mutual respect. It has been your constant efforts in fulfillment of that mission, far more than your size or your wealth or your military might, that have made America an inspiration to all mankind.

It must be recognized that your model was never one of realized perfection, but of ceaseless aspiration. From the outset, for example, America denied the African slave his freedom and human dignity. But in time you righted that wrong, albeit at an incalculable cost in human suffering and loss of life. Your impetus has almost always been toward a fuller, more all-embracing conception and assurance of the rights which your founding fathers recognized as inherent and God-given. Yours has ever been an inclusive, not an exclusive society. And your steps, though they may have paused or faltered now and then, have been pointed in the right direction and have trod the right path. The task has not always been an easy one, and each new generation has faced its

own challenges and temptations. But, in a uniquely courageous and inspiring way, America has kept faith.

Yet there has been one infinitely tragic and destructive departure from those American ideals in recent memory. It was this Court's own decision in 1973 to exclude the unborn child from the human family. Roe v. Wade, 410 U.S. 113 (1973). You ruled that a mother, in consultation with her doctor, has broad discretion, guaranteed against infringement by the United States Constitution, to choose to destroy her unborn child. Your opinion stated that you did not need to "resolve the difficult question of when life begins." 410 U.S. at 159. That question is inescapable. If the right to life is an inherent and inalienable right, it must surely obtain wherever human life exists. No one can deny that the unborn child is a distinct being, that it is human, and that it is alive. It is unjust, therefore, to deprive the unborn child

of its fundamental right to life on the basis of its age, size, or condition of dependency. It was a sad infidelity to America's highest ideals when this Court said that it did not matter, or could not be determined, when the inalienable right to life began for a child in its mother's womb.

America needs no words from me to see how your decision in Roe v. Wade has deformed a great nation. The so-called right to abortion has pitted mothers against their children and women against men. It has sown violence and discord at the heart of the most intimate human relationships. It has aggravated the derogation of the father's role in an increasingly fatherless society. It has portrayed the greatest of gifts -- a child -- as a competitor, an intrusion, and an inconvenience. It has nominally accorded mothers unfettered dominion over the independent lives of their physically dependent sons and daughters. And, in granting this unconscionable power, it has exposed many

women to unjust and selfish demands from their husbands or other sexual partners.

Human rights are not a privilege conferred by government. They are every human being's entitlement by virtue of his humanity. The right to life does not depend, and must not be declared to be contingent, on the pleasure of anyone else, not even a parent or a sovereign. The Constitutional Court of the Federal Republic of Germany recently ruled:

> The unborn child is entitled to its right to life independently of acceptance by its mother; this is an elementary and inalienable right which emanates from the dignity of the human being.

Judgment of May 28, 1993, The Constitutional Court of the Federal Republic of Germany, Judgment of the Second Senate, 20 EuGRZ 229-275 (consolidated case nos. 2 BzF2/90, 2 BzF 4/92, 2 BzF 5/92). Americans may feel justly proud that Germany in 1993 was able to recognize the sanctity of human life. You must weep that your own government, at present, seems blind to this truth.

I have no new teaching for America. I seek only to recall you to faithfulness to what you once taught the world. Your nation was founded on the proposition -- very old as a moral precept, but startling and innovative as a political insight -- that human life is a gift of immeasurable worth, and that it deserves, always and everywhere, to be treated with the utmost dignity and respect.

CONCLUSION

I urge the Court to take the opportunity presented by the petitions in these cases to consider the fundamental question of when human life begins and to declare without equivocation the inalienable rights which it possesses.

Respectfully submitted,

MOTHER TERESA OF CALCUTTA

Robert P. George

ROBERT P. GEORGE, ESQ.

(8)

No. 93-1148

Supreme Court, U.S.
FILED
FEB 17 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCE

Petitioner,

v.

THE STATE OF NEW JERSEY

Respondent.

No. 93-1149

TINA KRAIL, LORI CHADWICK
DEBORAH SMOLDORE AND JEANNIE HENDERSON

Petitioners,

against

THE STATE OF NEW JERSEY

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF *AMICI CURIAE* OF University Faculty for Life and Members of Congress, Hon. James Barcia, Hon. Thomas Bliley, Hon. Thomas De Lay, Hon. Jay Dickey, Hon. John Doolittle, Hon. Robert K. Dornan, Hon. Bill Emerson, Hon. Duncan Hunter, Hon. Earl Hutto, Hon. Henry Hyde, Hon. Robert Inglis, Hon. Peter T, King, Hon. John Lindner, Hon Ileana Ros-Lehtinen, Hon. Christopher H. Smith, Hon. Barbara L. Vucanovich and (cont'd)

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31p

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QUESTION PRESENTED

Whether the human *being*, whose life begins at conception as demonstrated by scientific and medical consensus, is also a legally protected *person* from fertilization through adult death.

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INTEREST OF AMICI CURIAE

The University Faculty For Life encourages scholarly research used in public policy on abortion.

SUMMARY OF ARGUMENT

University Faculty for Life (UFL) adopts and supports the position of the Petitioner that there is now a scientific consensus that the life of every human being begins at fertilization. This brief demonstrates that every human *being* is simultaneously a human *person* from the moment of *fertilization*. No real valid scientific or philosophical distinction can be made between a human being and a human person after fertilization. Arguments for "personhood" at various biological marker events during human embryogenesis or after birth cannot be sustained either scientifically or philosophically.

ARGUMENT

In support of the Petitioner UFL argues here that there is no distinction between a human being and a human person from fertilization on. However, some argue that there is no human person present until the 2-cell, 5-6 day, 14 day, various brain-related ("rational attributes", or sentience), or early childhood stages of human development—and *therefore* no Constitutional rights and protections are due until those developmental stages. UFL argues against such claims and for "personhood" at fertilization, because the accurate scientific evidence and an objectively based philosophy demonstrate this; whereas the arguments for "delayed personhood" are based on inaccurate science, and theoretically and empirically refutable philosophical definitions. The term "human being" is co-extensive with the term "human person" from fertilization on, and *therefore* a human being is due constitutional rights and protections at fertilization.

A. The Correct Science And A Realistic Philosophy Demonstrate No Distinction Between A Human Being And a Human Person

First, it is important to understand that our argument is based only on logic, science and philosophy—not on religion or theology.

Second, it is critical for this Court to consider the logical outline and conclusions of the alternative arguments. It is claimed that certain (different) degrees of physiological development are the *physiological preconditions* for the capacities of "rational attributes" or "sentience"—i.e., the preconditions for "personhood". But the specific humanly functioning physiological precondition for all such physiological preconditions is the functioning human zygote itself formed at fertilization. Thus these arguments for "preconditions" fail.

Or it is claimed that a human person should be defined only in terms of the *actual exercising* of either (1) "rational attributes", or of (2) "sentience", or brain integration. However, empirically, the exercise of either full "rational attributes", sentience or brain integration cannot take place until years after birth; and some higher primates are more sentient than normal human infants or young children. Therefore many populations of human beings would *not be persons,* and this Court would be required to permit: the denial of health care or other legal benefits and protections; or their treatment as "animals", e.g., used in experimental medical research or religious sacrifices, or unrestrictedly harvested for organs; or the infanticide of normal healthy human infants and young children. Such human populations would also include: patients with Alzheimer's or Parkinson's disease, multiple sclerosis, the mentally ill, the depressed, alcoholics, drug addicts, the comatose, etc.

Given these critical logical precisions we will proceed with our argument. Accurate scientific evidence demonstrates *unequivocally* that the life of every human being begins at fertilization. Although fertilization is a process, within that process there is a point in time and space when an individual human being begins. The "23" chromosomes of the sperm which are different from the "23" chromosomes of the ovum combine during fertilization to form a human zygote with "*46*" chromosomes. These chromosomes are qualitatively different from either parent,

and are the specific number characteristic of the human species [1] (and not simply of the genus "animal").[2]

Immediately the human zygote produces specifically *human* proteins and enzymes; [3] *no genetic* information is gained or lost; and this genetic information *cascades* throughout embryogenesis.[4] Thus the human zygote ultimately directs and is the cause of virtually *all* of the processes of human development after fertilization, including: [5] molecular information, methylation, cell division, totipotency, differentiation, implantation, formation of the primitive streak, nerve net and full brain integration—and all developmental and growth processes after birth. *Physiologically there is no break or distinction during the entire continuum of human development* (even if there is twinning). Therefore scientifically it is clear that the human zygote formed at fertilization is specifically and characteristically a new real existing individual human being. Even if some human zygotes are spontaneously aborted, such external circumstances do not change the internal "nature" of the human zygote as a human being.

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[1] K.L. Moore, *The Developing Human* (Philadelphia: W.B. Saunders Co., 1982, 3rd ed.), 14ff; B. Lewin, *Genes III* (New York: John Wiley and Sons, 1987), 24ff.

[2] Lewin (1987), ibid., 386-394, 401; A.E.H. Emery, *Elements of Medical Genetics* (New York: Churchill Livingstone, 1993), 93; A. Schniecke et al, "Introduction of the human pro alpha 1(I) collagen gene into pro lapha 1(I)-deficient Mov-13 mouse cells leads to formation of functional mouse-human hybrid type 1 collagen", *Proceedings of the National Academy of Science-USA* 84:3 (Feb. 1987), 764-8.

[3] G. Kollias et al, "The human beta-globulin gene contains a downstream developmental specific enhancer. "*Nucleic Acids Research* 15:14 (July 1987), 5739-47; R.K. Humphries et al, "Transfer of human and murine globulin-gene sequences into transgenic mice," *American Journal of Human Genetics 37:2 (1985), 295-310.*

[4] Emery (1983), op. cit., 103; Mavilio et al, "Molecular mechanisms of human hemoglobin switching: selective undermethylation and expression of globin genes in embryonic, fetal and adult erythroblasts," *Proceedings of the National Academy of Sciences-USA* 80:22 (1983), 690.

[5] Lewin (1987), op. cit., 681; Emery (1983), op. cit., 93.

There must be a direct relationship between these scientific facts and any objectively based philosophical definition of a "human being" if our philosophical concepts are to accurately reflect reality. Not all philosophical definitions are relative. Some are empirically based; others are not. It is possible to have an *objectively* based philosophical definition of a human being if a realistic method is employed.

A realist philosophy *begins* its deliberations and grounds its concepts and definitions on this accurate science, and *checks back* to it to determine their truth or falsity.[6] If the concepts and definitions correlate with the scientific evidence, then they are true; if not, then they are false. Philosophical definitions use terms which reflect the "*nature*" of a thing, determined empirically by observing the specific and characteristic *kinds of actions and functions* a thing performs. This is the obvious reasoning principle behind any basic scientific research: function follows form.[7] Sodium burns orange, cobalt burns blue—bacteria can only be grown on specific culture medium. Birds can fly, but human beings and gorillas cannot; giraffes can produce "giraffe" proteins, enzymes and embryos; but corn stalks or human beings cannot. This is how things are scientifically categorized into natural *kinds*.

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[6] G. Klubertanz, *Introduction to the Philosophy of Being* (New York: Appleton-Century-Crofs, 1963); E. Gilson, *Being and Some Philosophers* (Toronto: Pontifical Institute of Mediaeval Studies, 1949); D. Irving, "Science, philosophy, theology-and altruism: the *chorismos* and the *zygon*" in H. May, M. Streignitz, P. Hefner (eds.), *Loccumer Protokolle* (Rehburg-Loccum: Evangelische Akademic Loccum, 1992); Irving, "Scientific and philosophical expertise; an evaluation of the arguments on 'personhood'", *Linacre Quarterly* 60:1 (Feb. 1993), 21-22; Irving, "The impact of scientific 'misinformation' on other fields; philosophy, theology, biomedical ethics, public policy", *Accountability in Research* 2:4 (April 1993), 244-249.

[7] Lewin (1987), op. cit., 11-13, 30; Emery (1983), op. cit., 101-103.

Applying this principle, a realist draws from the accurate embryological information to explain and determine what has taken place, and if and when a human being exists. It concludes philosophically from the above scientific facts that at fertilization a *substantial* change (i.e., a change in "natures") has taken place. *Before* fertilization, only a sperm and an ovum exist, which each contain only "23" chromosomes. They cannot produce specifically human enzymes or proteins or functionally develop into a human zygote or human being even if implanted singly in the womb. They must first recombine. *After* fertilization a different "nature" exists—i.e., a human being, and subsequently there is only *accidental* change (i.e., only a change in growth and development).[8] The human zygote now contains "46" chromosomes, produces specifically human enzymes and proteins, tissues and organs, and does not gain or lose any genetic information. Only human growth and development take place —and only through the agency of the genetic and other information ultimately contained in the original human zygote. Thus at fertilization the matter is "appropriately formed" [9]—it is humanly formed and it is functioning and acting humanly. Philosophically we conclude, then, that a *human being* exists after fertilization.

We can also conclude philosophically that the human zygote possesses the *potency* [10] (capacity) to direct its

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[8] H.B. Veatch, *Aristotle: A Contemporary Approach* (Indiana: Indiana University Press, 1974), Chap. 2, 3; G. Klubertanz, *The Philosophy of Human Nature* (New York: Appleton-Century Crofts, 1953, 124ff).

[9] Klubertanz (1953), *ibid.*, 312; B. Ashley, "A critique of the theory of delayed hominization", in D.G. McCarthy and A.S. Moracrewski (eds.), *An Ethical Evaluation of Fetal Experimentation: An Interdisciplinary Study* (St. Louis: Pope John Center, 1976), 113-133.

[10] Aristotle, in R. McKeon (ed.), *The Basic Works of Aristotle* (New York: Random House, 1941), "Metaphysica" (Book Theta) 9.1.10461-9.8.105b, p. 826-831; T. Aquinas, *On Being and Essence*, A. Mauer (trans.) (Toronto: The Pontifical Institute of Mediaeval Studies, 1983), 58, 62-63.

own continuous development. This potency is possessed by an already existing individual human being. Therefore, the human zygote is *not* a "possible" or "potential" human being or human person—i.e., one that does not yet exist—but an *already existing* and *functioning* human being with a potency to *develop* itself further.

But is it a human "person"? Just as the law does not distinguish between a human being and a human person, neither does a realist philosophy. Definitionally there is *no philosophical distinction between a human being and a human person,* because the *terms are co-extensive.*[11] The definition of a human being includes the *entire* complex concrete being—including the characteristic "vegetative" and "sensitive" powers, and the "rational" power of thinking and choosing—as well as the human body. Thus there are no real "splits" among the human powers, nor between those powers and the body. If there are no splits, the entire human being—including all of his or her powers—must be present *simultaneously* when the human being begins, at fertilization.

The human zygote (or embryo or fetus) not only possesses the real and presently existing *capacity* of a human being; it is also *exercising* that capacity by acting in a human—i.e., a "rational"—way. This is confirmed once again by the accurate scientific evidence. If there were only "vegetative" powers present at fertilization, the human zygote would not "know" how to direct the formation of specifically *human* enzymes and proteins—only "vegetative" ones. If there were only "sensitive" or "animal" powers present, the human zygote would not "know" how to direct the formation of specifically *human* tissues

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[11] K. Doran, "Person—a key concept for ethics," *Linacre Quarterly* 56:4 (1989), 39; Aristotle, *De Anima,* in McKeon (1941), op. cit., 1.4.411b, 14-18 and 24-28, p. 554; T. Aquinas, *Summa Theologica,* Fathers of the English Dominican Provence (trans.), (Westminster, MD: Christian Classics, 1981), v. 1, I.a.q.29,a.1, ans., ad. 2,3,4, p. 156; R. Barry, "Self-consciousness and personhood", *Linacre Quarterly* 46:2 (1979).

and organs—only "animal" ones. However, scientifically we observe that specifically *human* proteins and enzymes, tissues and organs are produced from fertilization on.

If the human being is scientifically demonstrated to be present at fertilization; and if specifically human products and organs are formed from fertilization on; and if a human being is realistically defined *inclusive* of all of its powers (which cannot be split from each other or from the body); then all of these powers must be present when the human being is present—at fertilization—including the "rational" power of thinking and choosing.

Thus *there is no scientific or philosophical distinction between a human being and a human person.* A human being who is simultaneously a human person is present at fertilization, and acting humanly. Since every human being is constitutionally due his or her rights and protections, and since the life of every human being begins at fertilization, then every human being is due those rights and protections from fertilization on—including the unborn child of Loce.

B. Arguments for "Delayed Fetal Personhood" Are Based On Inaccurate Science

Some are currently arguing that "personhood" is only a "social construct",[12] or that even though there is a human *being* present at fertilization, there is no human *person* present until some later biological "marker event" during the continuum of human embryological development. These writers make a *real distinction* between a human being and a human person—and only human persons are due social, ethical or legal rights and protections. The main purpose of this section is to point out the serious scientific discrepancies in the science used in these "delayed fetal personhood" debates.[13] *Different conclu-*

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[12] J.A. Robertson, "Extracorporeal embryos and the abortion debate", *Journal of Contemporary Health Law and Policy* 2:53 (1986), 53-70.

[13] See, e.g., D. Irving, *Philosophical and Scientific Analysis of the Nature of the Early Human Embryo* (Doctoral Dissertation,

sion about "personhood" follow from different sets of scientific evidence. Their arguments are as follows:

Some argue that the early human embryo is only a "blob", a lump of the mother's tissues, and not a human being. Others, e.g., Suarez[14] , claim that a human person begins only at the 2-cell stage, *with the completion of the genetic input* of the program "man". However, the human embryo is not a "blob" or a piece of the mother's tissues. The mixture of chromosomes in the human embryo is *unique* for that single embryo and *different* from those in either the mother or the father. The human embryo *is* a human being—as verified by placing it under a microscope and counting the number of chromosomes—i.e., "46". Finally, at fertilization the *completion* of the genetic input has already taken place at the 1-cell human zygote stage.

Bedate and Cefalo[15] argue that the human zygote is not a person; it is *not specifically human* and does not

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Washington, D.C.: Georgetown University, 1991), see summaries pp. 23, 53, 59, 70, 82, 114, 131, 145, 169, 205, 245, 247, 259; C.W. Kischer, "Human development and reconsideration of ensoulment", *Linacre Quarterly* 60:1 (Feb. 1993), 57-63; J.J. Carberry and D.W. Kmiec, "How law denies science" *Human Life Review* 18:4 (1992), 105; A. Fisher, "Individuogenesis and a recent book by Fr. Norman Ford", *Anthropotes* 2 (1991), 199ff; W.E. May, "Zygotes, embryos, and persons", *Ethics and Medics*, Part I 16:10 (Oct. 1991); B. Ashley, "Delayed hominization: Catholic theological perspectives," *The Interaction of Catholic Bioethics and Secular Society*, R. E. Smith (ed.) (Braintree, MA: The Pope John Center, 1992), 163-180; A. Regan, "The human conceptus and personhood", *Studia Moralis* 30 (1992), 97-127; P. McCullagh, *The Foetus As Transplant Donor: Scientific, Social and Ethical Perspectives* (New York: John Wiley and Sons, 1987); A.A. Howespian, "Who or what are we?", *Review of Metaphysics* 45 (March 1992), 483-502. G. Grisez, "When do people begin?", *Proceedings of the American Catholic Philosophical Association* 63 (1990), 27-47.

[14] A. Suarez, "Hydatidiform moles and teratomas confirm the human identity of the preimplantation embroyo," *Journal of Medicine and Philosophy* 15 (1990); 627-635.

[15] C. Bedate and R. Cefalo, "The zygote: to be or not be a person", *Journal of Medicine and Philosophy* 14:6 (1989), 641; see

contain *"information" about differentiation.* It only contains enough *genetic* information to proceed through the *blastocyst* stage. After that, differentiation and the other processes of embryogenesis depend on *molecular* information from the mother, "information" not present in the zygote. Also, the developing embryo can give rise to biological entities which are *not* human beings, i.e., hydatidiform moles and teratomas. But empirically we know that the human zygote *is* specially human and does *contain and control* all of the genetic information of *all* of the processes of embryogenesis, including differentiation and those processes past the blastocyst stage. Considerable scientific evidence has already been noted demonstrating that specifically *human* enzymes and proteins are produced after fertilization. It has also been demonstrated precisely that differentiation is caused by the genetic information in the developing embryo and *not by the mother.*[16] Even *molecular* information arising wtihin the embryo is determined ultimately by the *genetic* information in the one-cell zygote (by means of its "genetic information *cascade*"). *Molecular* information from the mother is only selectively *used* by the embryo. Such molecular information does not change the very *nature* of the human zygote. Finally, hydatidiform moles and teratomas *do not arise from genetically normal embryos,*[17] but from abnormal entities

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also, Thomas J. Bole, III, "Metaphysical accounts of the zygote as a person and the veto power of facts", *Journal of Medicine and Philosophy* 14 (1989), 647-653; also Bole, "Zygotes, souls, substances, and persons", *Journal of Medicine and Philosophy* 15 (1990), 637-652.

[16] H. Holtzer, J. Biekl and B. Holtzer, "Induction-dependent and lineage-dependent models for cell-diversification are mutually exclusive," *Progress in Clinical Biological Research* 175 (1985), 3-11; Mavilio et al (1983), op. cit., 664-8; C. Hart et al., "Homeobox gene complex on mouse chromosome II: molecular cloning, expression in embryogenesis, and homology to a human homeo box locus", *Cell* 43:1, (1985), 9-18.

[17] A.E. Szulmann, U. Surti, "The syndromes of hydatidiform mole. I. Cytogenic and morphologic correlations," *American Journal of Obstetrics and Gynecology* 131 (1978), 665-671; M.S.E. Wimmers, J.V. Van der Merwe, "Chromosome studies on early

(usually caused by dispermy or parthenogenic eggs; parthenogenesis in humans has never been reported [18]) which are *not*, therefore, genetically normal human beings to begin with.

McCormick and Grobstein [19] claim that "personhood" ("ensoulment") cannot take place until about 14 days. Before then there is only a *genetic* individual (a "potential" person); after, there is also a *developmental* individual—i.e., a real human person. After fertilization the human zygote undergoes *equal* divisions; after the third division the aggregate contains 8 cells "loosely connected". These cells are totipotent (each can produce a complete adult human being), so they are not *developmentally* single—and therefore, not a person. Before 14 days there is only a "pre-embryo" (a "non-person"). That is, at the 5-6 day stage, development does not primarily involve formation of the embryo and its parts [i.e., the inner blastocyst layer of cells] but the "non-embryonic" trophoblast [i.e., the outer layer of cells]. After birth *all of the cells from the trophoblast layer are discarded* as the placenta, etc. The presence of this non-essential trophoblast layer of cells indicates that the 5-6 day "pre-embryo" is not yet developmentally single, and therefore not a person. Also, individuality is not present before 14 days because: a) if *two* eight-cell stages of different parentage are *fused, a single* adult is produced, and; b) until 14 days and the formation of the primitive streak *twinning* can take place by division of the inner cell mass. After 14 days *twinning cannot take place* and the organism is finally "developmentally" single (and therefore a person). Finally, a developmental individual is not present until a single body axis (primitive streak) has begun to form. near the end of the *second post-fertilization week* when *implantation* is under way.

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human embryos fertilized *in vitro*," *Human Reproduction* 7 (1988), 894-900.

[18] Moore 1982, op. cit., 32.

[19] Richard McCormick, S.J., "Who or what is the preembryo?", *Kennedy Institute of Ethics Journal* 1:1 (1991), 1.

However, empirically we know that the cells do *not* divide equally, but unequally. Also, totipotency is scientifically far more complicated than depicted. E.g., these cells do *not* each contain the same potential as each other or as the zygote. Totipotency is *normal*, and actually coded for by the genetic information in the human zygote. These cells are totipotent because certain genes have not yet been *silenced* by methylation (and other processes)—not because of the reverse claim, i.e., the cells "don't know how many individuals to be yet".[20]

And we know that the cells of the trophoblast layer are *not* "non-embryonic"; all of these cells are *not* discarded after birth. The dorsal [part of the yolk sac is incorporated into the *later embryo* as the primordium of the primitive gut. The allantois is represented in the *adult* human being as a fibrous cord, the median umbilical ligament extending from the apex of the urinary bladder to the umbilicus. The allantois is also involved with early blood formation. The primitive blood cells are derived *mainly* from the epithelial cells of blood vessels in the yolk sac and the allantois.[21] Thus the pre-embryo *is both* a "genetic" and a "developmental" individual.

But recombination is not used in this context; it is associated with the crossing over of the male and female genes during the meiotic division of *fertilization* itself. A chimera and mosaic are caused by *non-disjunction* of the chromosomes—not by either "fusion" or by "recombination". And these latter two situations can only arise *before* the 3-cell stage, not at the 8-cell stage. A *mosaic* is formed by cells of the *same* genetic origin, not

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[20] J. Lejeune, testimony in *Davis v. Davis*, Circuit Court for Blount County, State of Tennessee at Maryville, Tennessee, 1989; Kischer (1993), op. cit., 58-59.

[21] Moore (1982), p. 33, 62-63, 68, 111 and 127; W.J. Larsen. *Human Embryology* (New York: Churchill Livingstone, 1993), 19, 37-40.

by different parentages. A *chimera* can be formed from cells of different parentages, but this takes place at the *zygotic* stage, not at the 8-cell stage.[22]

Also, monozygotic twinning *can* take place *after* 14 days.[23] As Kischer notes, their depiction of "multiplicity" and "individuality" is scientifically simplistic. "Individuality" is determined in many cases before 14 days; 30% of monozygotc twinning occurs at the 2-cell to 8-cell stages—and *not* by division of the inner mass; multiplicity of birth from dizygotic origin appears to be familial (i.e., genetic); factors determining monozygotic twinning are *not* known; and multiplicity beyond twinning may include a combination of dizygotic and monozygotic-derived embryos.[24] Too much emphasis has been placed on twinning. If it occurs (either from mechanical or natural means), it only signifies that one *individual* has given way to two individuals. The individuality of the latter in no way diminishes the *reality* of the individuality of the former. Finally, implantation does *not* start at the end of the second week post-fertilization, but between 5-6 days. The beginning of the formation of the primitive streak is between 15-19 days, disappearing by the end of the fourth week.[25]

The extent of the inaccurate science used by McCormick and Grobstein (and others) has been puzzling to many embryologists. C. Ward Kischer, a prominent embryologist, remarks that McCormick's new *moral* status (or lack thereof) for the so-called "pre-embryo" is derived from Grobstein, whose "new embryological states" are "simply not true". He argues that the "scientific data" they use has been highly selected and *leaves out the majority of other relevant data*:

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[22] Emery (1983), op. cit., 57, 83-85.

[23] K. Dawson, "Segmentation and moral status", in P. Singer et al, *Embryo Experimentation* (New York: Cambridge University Press, 1990); see also, Moore (1982), 133.

[24] Kischer (1993), op. cit., 58-59.

[25] Moore (1982), op. cit., 53, 56; Kischer (1993), op. cit. 59.

> It is not a question as to whether science can or cannot decide the question of personhood. Science is *not interested* in deciding personhood. However, if the socio-legal status of personhood cannot be decided without invoking what is known scientifically, then the *whole* of scientific data should be used and not arbitrarily selected bits and pieces of data. (emphasis in the original)
>
> . . . *Human embryology is now in danger of being rewritten* as a stratagem statement of current socio-legal, but also of late, even theological, issues. Unless the errors are corrected now, we will be in danger of entering a protracted period of *false concepts concerning our own development.*[26] (emphasis added).

In sum, McCormick and Grobstein's distinction between a genetic individual (a "non-person") and a developmental individual (a "person"), as well as their claims about a so-called "pre-embryo" cannot be scientifically sustained. The scientifically inaccurate term "pre-embryo" ought to be excised from the bioethics and legal literature.

—Ford [27] argues for "personhood" at 14 days. Before that there are only "groups of cells", a "potential" person, or a "biological individual". Until the blastocyst stage, the cells have not been *fully differentiated,* which takes place after the formation of the *primitive streak* (when no twinning can occur). But scientifically we know that full differentiation is not completed until *early adulthood*; [28] certainly *it is not* completed by the 14-15 day stage. Finally, twinning *can* take place after 14 days.

—Wallace [29] argues for "delayed fetal personhood" by setting up a series of analogies. Each of the "succeeding souls" can be described, he claims, in terms of the *"ma-*

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[26] Kischer (1993), op. cit., 57-63.

[27] N. Ford, *When Did I Begin?* (New York: Cambridge University Press, 1988), 137, 156.

[28] Moore (1982), op. cit., 1.

[29] W. A. Wallace, "Nature and human nature as the norm in medical ethics,", in E.D. Pellegrino, J. Langan and J.C. Harvey,

ture" nature of the individuals of its species (e.g., a mature plant, a mature animal, and then a mature human species). If these descriptions are transferred to his *model* of human embryogenesis—or "delayed fetal personhood"—we should then consider each of these natures as *"transient"* natures which successively evolve until the "rational" nature (or "soul") is "infused" and "personhood" is finally attained. The "rational soul" cannot be "infused" until the "matter" is appropriately organized—at about 3 months, and it is the "rational soul" which makes the organism *specifically human* and which *directs and organizes* the matter as *human.*

But, empirically we know there is no such thing as *two* kinds of natures of one and the same specific kind of thing. There are not both "transient" and "mature" natures of a plant, an animal or a human being. An acorn is genetically an oak—albeit a tiny one. The analogy is empirically invalid. Also, if the "rational" human nature which is "infused" about 3 months as Wallace claims, is actually descriptive of a *"mature"* human nature, is it true then that a 3 month fetus is actually a mature human being—and acts and functions as one?

Finally, the matter is "appropriately organized" by the end of fertilization, when empirically there is already a human being with "46" chromosomes. Immediately specifically *human* enzymes and proteins are produced (not tomato or frog enzymes); all of the information for cleavage, differentiation, implantation, etc. is *already* present; by 3 months specifically *human* functions, reactions, tissues and organ formations have *already* taken *place* (*empirically the formation of cabbages or giraffe* tissues and organs has *not* taken place). There is no biological need for a "rational soul" to be infused to make it something it *already* is, i.e., specifically *human* and directing *human* formations. This has *already been done* by something back at the zygote stage. The very concept of "delayed fetal personhood" is untenable.

(eds.), *Catholic Perspectives on Medical Morals* (Dordrecht: Kluwer Academic Publishing, 1989), 23-53.

—Some argue [30] for various "marker events" of "personhood" from about 8 weeks to birth or early childhood (brain criteria, i.e., "rational attributes", or sentience—i.e., the ability to feel pain). Thus "personhood" is determined by the appearance of the nerve net, cortex or integration of the brain as a whole, etc. These *physical* structures are the *physiological precondition* for the *capacity* for either sentience, or for "rational attributes" (e.g., self-consciousness, autonomy, loving, willing, interacting with one's environment, etc.); or they signal *the actual exercising* of those capacities.

However, the advocates for the definition of a human person *only* in terms of either "rational attributes", or *only* in terms of sentience, are using definitions with very specific philosophical presuppositions: generally Cartesian, rationalist or empiricist. These presuppositions contain quite serious theoretical difficulties *precluding* them from realistically being used in these "personhood" debates (see Section C).

The *scientific evidence* for these claims is empirically vague, scientifically controversial, and only "posited" as theories. Many scientists criticize that there is a reading into the scientific evidence more than is physiologically or conceptually possible. E.g., Jones [31] argues that there is *no scientific evidence* which demonstrates the correlation of "consciousness" and the organizing of the nervous

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[30] E.g., D.G. Jones, "Brain birth and personal identity", *Journal of Medical Ethics* 15:4 (1989), 173-178; H.-M. Sass, "Brain life and brain death; a proposal for normative agreement", *Journal of Medicine and Philosophy* 14 (1989), 45-59; C.A. Tauer, "Personhood and human embryos and fetuses", *Journal of Medicine and Philosophy* 10 (1985), 253-266; M. Lockwood, "Warnock versus Powell (and Harradine); when does potentiality count?", *Bioethics* 3:5 (1988), 187-213; Clifford Grobstein, "The early development of human embryos", *Journal of Medicine and Philosophy* 10 (1985), 213-236; M.V. Bennett, "Personhood from a neuroscientific perspective", in Doerr et al, *Abortion Rights and Fetal "Personhood"* (Long Beach; Cresline Press, 1989).

[31] Jones (1989), ibid., 178.

system. Scientifically there is *no valid parallel*, he argues, between "brain death" and "brain birth". "Brain death" is the gradual or rapid cessation of the functions of a *brain*; "brain birth" is the very gradual acquisition of a function of a developing *neural* system (which is *not* a brain). There are no *neurological* reasons, he states, for concluding that an incapacity for consciousness becomes a capacity for consciousness once this point is past. The nervous system of the 8-week fetus is quite *different* from that of the 8 month fetus or 2 year old child. Thus it is *impossible*, he argues, to recognize a distinct point of transition from a "non-brain" to a "brain", or from a non-functioning nervous system to a functioning one. Therefore, Jones concludes, it is impossible to recognize a distinct point of transition from a "non-person" to a "person". To echo the above comments by Kischer, a different Jones has remarked:

> The reproductive biologist cannot assign moral status to the sperm or the egg or the fertilized egg or any of the subsequent products that may result from this fusion. . . The reproductive biologist can help, however, by assuring that other scientists or those who wish to assert a moral status, and use a biological term or concept to do so, *know what they are talking about*.[32] (emphasis added)

Therefore *none* of these arguments for "delayed personhood" at various biological "marker events" during human embryogenesis are scientifically valid. Every one of them is grounded on inaccurate or misapplied science. Thus they have *failed* to prove any real valid *scientific* distinction between a human being and a human person.

C. Arguments for "Delayed Fetal Personhood" Are Based On Historically Inaccurate Or Refutable Philosophical Presuppositions

Many of these arguments for "delayed fetal personhood" also incorporate philosophical claims which are

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[32] H.W. Jones and C. Schroder, "The process of human fertilization: implications for moral status", *Fertility and Sterility* 48:2 (August 1987), 192.

historically inaccurate. The extent of the inaccuracies and the impact they could have in this case, as well as in the formulation of public policy, requires at least they be briefly identified. *Different conclusions about "personhood" follow from different philosophical definitions of a human being or a human person.* For further detailed research, references are provided.[33]

Most historical inaccuracies concern the theories of some of the major figures in the history of philosophy. Philosophers such as Plato, Aristotle, the scholastics, Aquinas and Descartes are misinterpreted, conflated, or mixed together indiscriminately. The internal contradiction within Aristotle or Aquinas of a "succession of souls" with their mainstream metaphysics of being is not even acknowledged. The two philosophies are often basically equated, with no awareness of their inherent differences. Both are sometimes conflated with scholasticism. Their theories of act and potency are constantly depicted incorrectly (often the source of the contemporary *misuse* of the terms "potential" or "possible" human being or person) as are their theories of being, human being, human "soul", and natural law. No mention is made of the severe *chorismos* or "separation" problems of Plato's or Descartes' mind/body split, nor of the destructive consequences of these theoretical problems on their definitions of a human person or scientific theories. Part of Aristotle's metaphysics is virtually grafted onto Englehardt's "metaphysics". Descartes' purely *immaterial* rational attributes are mixed invalidly with a Lockean *materialistic* theory of sentience, theoretically *negating* any conclusions. This is not a question of "interpretations" or of "translations"—but simply the misrepresentation of acknowledged historical fact. All of these historical inaccuracies and theoret-

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[33] For a detailed study see D. N. Irving, *Philosophical and Scientific Analysis of the Nature of the Early Human Embryo*, (doctoral dissertation, Georgetown University, Department of Philosophy, Washington, D.C., 1991 (especially the summaries on pp. 23, 53, 59, 70, 82, 114, 131, 145, 169, 205, 247, 259; as well as Chapter Five, and Appendices A and B).

ical contradictions in the premises become embedded in the conclusions of the arguments, determining the definition of "person" as well as the choice of biological markers which a writer selects for "delayed fetal personhood".

Also, historically, there are a number of different "schools" of philosophy which developed over the centuries which often came to different and contradictory philosophical conclusions about reality. Each "school" defined "*being*" differently, and therefore each defined a *human* being differently.[34] We are all heirs of this legacy —no matter what our academic "field" is.[35]

Some schools (e.g., Plato, many scholastics and Descartes),[36] argue a human being is defined as at least *two substances*—e.g., "soul" (or mind), and body—existing *independently* of each other. The major chronic theoretical problem with these dualistic definitions is that therefore there is a mind/body split; thus absolutely *no*

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[34] E. Gilson (1963), op. cit., esp. Chap. 1; K. Doran (1989), op. cit., 38-49.

[35] A.C. Crombie, *Medieval and Early Modern Science* (New York: Doubleday Anchor Books, 1959), 10; D. Allen, *Philosophy For Understanding Theology* (Atlanta: John Knox Press, 1985).

[36] G. Vlastos, *Plato: A Collection of Critical Essay* (Indiana: University of Notre Dame Press, 1978); Jowett, *The Dialogues of Plato* (New York: Random House, 1937); Rene Descartes, *Meditations on First Philosophy*, in J. Cottingham et al (trans.), *The Philosophical Writings of Descartes* (New York Press Syndicate of the University of Cambridge, 1984), 2nd Med., 12; for typical discussions of the theoretical problems of Cartesians, rationalists and empiricists, see: L.J. Eslick, "The material substrate in Plato", in E. McMullin, (ed.), *The Concept of Matter in Greek and Medieval Philosophy* (Indiana: University of Notre Dame Press, 1963); C. Fox, *Locke and the Scriblerians: Identity and Consciousness in Early Eighteenth-Century Britain* (Los Angeles: University of California Press, 1989); G. Meilander, *Challenging the Limits of Dualism* (University Park, PA; Pennsylvania State University Press, 1987); F. Wilhelmson, *Man's Knowledge of Reality* (New Jersey: Prentice-Hall, Inc., 1956); F. Copleston, *A History of Philosophy* (New York: Image Books, Vols. 1-9, 1962); E. Gilson (1963), op. cit.; N. Kemp-Smith, *A Commentary to Kant's "Critique of Pure Reason"* (London: The Macmillan Press Ltd., 1979), xxxiv, xlii, xliv.

interaction is explainable or actually possible between these two *separate* substances—i.e., between the immaterial "Mind" and the separated material "Body" (its physiological substrate.)

Some schools (e.g., rationalists) define a human being as only *one* of the two above "Cartesian" substances—e.g., Reason (or mind). As noted, if "personhood" is defined *only* in terms of "rational attributes", *then the following list of human beings are not persons*: e.g., the mentally ill, Alzheimer's and Parkinsonian patients, stroke victims, comatose and persistent vegetative state patients, drug addicts, drunks, alcoholics. Since empirically self-consciousness, autonomy, etc. are not actually present until *early childhood* [37], they must (and do) also argue for the permissibility of the infanticide of perfectly normal human infants. This rationalistic position has been generally articulated in the literature by writers such as Engelhardt and Tooley, who argue for the permissibility of infanticide.[38]

Some schools (e.g., empiricists) define a human being as only *one* of the other two "Cartesian" substances—e.g., Body or matter. This position is often used in the current literature to argue that some higher primates *are* persons, and some human beings are *not* persons. If one is arguing that a "human person" is defined *only* in terms of sentience or the physical integration or functioning of the brain, then one will also have to argue for the permissibility of infanticide, because empirically full integration and sentience is also not completed until several years *after* birth.

This is, indeed, the conclusion of writers such as Kuhse, Wells and Peter Singer.[39] Noting that he agrees with

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[37] Moore (1982), op. cit., 1.

[38] H.T. Engelhardt, *The Foundation of Bioethics* (New York; Oxford University Press, 1985), 111; M. Tooley, "Abortion and Infanticide," in *The Rights and Wrongs of Abortion*, M. Cohen et al (ed.) (New Jersey: Princeton University Press, 1974), 59 and 64.

[39] P. Singer and H. Kuhse, "The ethics of embryo research", *Law, Medicine and Health Care* 14:13-14 (1987); Kuhse and Singer, "For sometimes letting—and helping—die", *Law, Medicine*

Bentham's description of infanticide as "of a nature not to give the slightest inquietude to the most timid imagination", Singer states:

> If the fetus does not have the same claim to life as a person, it appears that the *newborn baby does not either*, and the life of a newborn baby is of *less value than the life of a pig, a dog, or a chimpanzee.* (emphasis added).[40]

Singer continues that we should put aside feelings based on the smallness, helplessness or—sometimes—cute appearances of human infants, and then we can see that *the grounds for not killing persons do not apply to newborn infants.*[41] This Court must consider the logical consequences of incorporating into law these rationalist and empiricist arguments which logically *must* conclude that many adult human beings are *not* persons and that the infanticide of perfectly normal human infants and children is permissible or consonant with the Constitution or acceptable public policy.

If the very theoretical structure of an argument is undermined by the use of inaccurate science and blatantly indefensible and objectively refuted problematic philosophical presuppositions, then the conclusions of these arguments should not be persuasive or accepted—much less incorporated into state or federal law.

CONCLUSION

For all the foregoing reasons, the University Faculty For Life strongly urges the Court to grant the Petition for Writ of Certiorari of Loce, individually.

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and Health Care 3:40 (1986), 149-153; Kuhse and Singer, *Should The Baby Live? The Problem of Handicapped Infants* (Oxford University Press, 1985), 138.

[40] P. Singer, "Taking life: abortion", in *Practical Ethics* (London: Cambridge University Press, 1981), 122-123.

[41] *Ibid.*, 123-124.

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